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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

R. A. GRAHAM,

Appellant,

vs.

THE J. D. SPRECKELS & BROTH-
ERS COMPANY, a corporation, and the
SOUTHERN PACIFIC COMPANY,
a corporation,

Appellees.

TRANSCRIPT OF RECORD

On Appeal from the District Court of the United States
for the District of Oregon.

Filed

JAN 2 - 1917

F. D. Monckton,
Clerk.

No. _____

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*United States Circuit Court of Appeals
for the Ninth Circuit.*

R. A. GRAHAM,

Appellant,

vs.

THE J. D. SPRECKELS & BROTHERS COMPANY, a corporation, and the
SOUTHERN PACIFIC COMPANY,
a corporation,

Appellees.

NAMES AND ADDRESSES OF THE ATTOR-
NEYS OF RECORD

Mr. John L. McNab and Mr. Robert M. Reid, Humbolt Bank Building, San Francisco, California, and
Mr. Martin L. Pipes, Chamber of Commerce Building, Portland, Oregon, for the Appellant.

Mr. Peter F. Dunne, and Morrison, Dunne & Borbeck, Crocker Building, San Francisco, California, and
Mr. William D. Fenton, Mr. Alfred A. Hampson, and Fenton, Dey, Hampson & Fenton, Fenton Building, Portland, Oregon, for the Appellees.

*In the District Court of the United States in and for
the District of Oregon.*

R. A. GRAHAM,

Plaintiff,

vs.

J. D. SPRECKELS & BROS. COM-
PANY, a corporation, and SOUTHERN
PACIFIC COMPANY, a corporation,
Defendants.

CITATION ON APPEAL.

United States of America,—ss.

To J. D. SPRECKELS & BROS. COMPANY, a
corporation; SOUTHERN PACIFIC COM-
PANY, a corporation.

Greeting:

You are hereby cited and admonished to be and appear in the Circuit Court of Appeals for the Ninth Circuit to be held in the City and County of San Francisco, State of California, thirty days from the date hereof, on the 14th day of July, 1916, pursuant to order allowing an appeal, filed and entered in the office of the Clerk of the District Court of the United States for the District of Oregon, from a final decree signed and filed and entered on the 22nd day of May, 1916, in that certain suit, being in equity, wherein Robert A.

Graham is complainant and J. D. Spreckels & Bros. Company, a corporation and Southern Pacific Railway Company, a corporation, are defendants, to show cause, if any there be, why the decree rendered against the said R. A. Graham, as in said order allowing appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

Witness the Honorable R. S. Bean, U. S. District Judge for the District of Oregon, this 14th day of June, 1916.

R. S. BEAN,

U. S. District Judge for the District of Oregon.

Service of the within citation on appeal is hereby admitted this 14th day of June, 1916, at Portland, Oregon.

MORRISON, DUNNE & BROBECK,

W. D. FENTON,

ALFRED A. HAMPSON,

Attorneys for Defendants.

Filed June 14, 1916.

G. H. MARSH, Clerk.

*In the Circuit Court of the United States for the
District of Oregon.*

OCTOBER TERM, 1907.

BE IT REMEMBERED, That on the 11th day of April, 1908, there was duly filed in the Circuit

Court of the United States for the District of Oregon, a transcript of record from the Circuit Court of the State of Oregon for Coos County, the complaint contained in said transcript being in words and figures as follows, to-wit:

COMPLAINT.

*In the Circuit Court of the State of Oregon for the
County of Coos.*

R. A. Graham,

Plaintiff,

vs.

J. D. Spreckels & Bros. Company, a corporation,
and Southern Pacific Co., a corporation,

Defendants.

The plaintiff complains of the defendants and alleges:

1. That at and during all the times hereinafter mentioned, the defendant J. D. Spreckels & Brothers Company was, and now is a private corporation duly incorporated and organized under the laws of the State of California and having its principal office and place of business in San Francisco in said State.

2. That at and during all the times hereinafter mentioned, the defendant Southern Pacific Co. was and now is a private corporation, duly incorporated and organized under the laws of the State of Kentucky, but engaged in business in Coos County, State of Ore-

gon, and having agents and clerks in said County and State upon whom the summons in this action can be served.

3. That long prior to and on or about the second day of July, 1906, the plaintiff was the owner and holder of the entire capital stock of the Coos Bay, Roseburg and Eastern Railroad & Navigation Company, a private corporation, duly incorporated and organized under the laws of the State of Oregon, and having its principal place of business in Marshfield, in said County, consisting of 20,000 shares of \$100 each of and all the bonds of said company secured by mortgage on the railroad, in said County, amounting to the sum of six hundred and twenty thousand dollars.

4. That said twenty thousand shares of capital stock were prior to and on said date of the reasonable value of \$30 per share and of the reasonable aggregate value of \$600,000 and bonds of the reasonable aggregate value of \$620,000.

5. That on said date said defendants, with full knowledge and notice of plaintiff's ownership of said stock and bonds, and his rights and interests therein, and with intent on the part of both to deprive him thereof wrongfully and unlawfully converted the same and the whole thereof to their own use by a sale and delivery of the same from said defendant, J. D. Spreckels & Brothers Company to said Southern Pacific Co., which still retains the possession thereof, claiming title thereto, and refuses to deliver the same to the plaintiff and denies his ownership and right thereto.

6. That by reason of the premises the plaintiff has been damaged in the sum of \$1,220,000, the value of said stock and bonds.

WHEREFORE the plaintiff demands judgment against the defendants for the sum of \$1,220,000, as damages by reason of said conversion, and for his costs and disbursements of this action.

E. B. WATSON and
W. C. BRISTOL,
Attorneys for Plaintiff.

STATE OF OREGON,
COUNTY OF MULTNOMAH,—ss.

I, E. B. Watson, being first duly sworn depose and say that I am one of the plaintiff's attorneys in the above entitled action; and that the foregoing complaint is true as I verily believe and that I make this affidavit for the reason that plaintiff is not a resident of, nor within said County or State.

E. B. WATSON.

Subscribed and sworn to before me this 2nd day of December, 1907.

R. G. MORROW,
Notary Public for the State of Oregon.

(Notarial Seal)

Endorsements:

No. 2485. In the Circuit Court, State of Oregon, for Coos County. R. A. Graham Plaintiff vs. J. D. Spreckels & Brothers Company and Southern Pacific

Co. Defendants. Complaint. Filed December 7th, 1907. James Watson, Clerk. E. B. Watson and W. C. Bristol, Attorneys for Plaintiff.

Transcript of Record on removal from Coos County filed in the Circuit Court of the United States for the District of Oregon on April 11, 1908, by J. A. Sladen, Clerk.

And afterwards, to-wit, on the 18th day of April, 1910, there was duly filed in said Court and cause, an Opinion on Demurrer to the answers in words and figures as follows, to-wit:

OPINION ON DEMURRER TO ANSWERS.

Wm. P. Lord and Wm. P. Lord, Jr., W. C. Bristol and E. B. Watson, Attorneys for Plaintiff.

W. D. Fenton, R. A. Leiter, Ben C. Dey, and James E. Fenton, Attorneys for Defendants.

BEAN, District Judge:

Action in trover by R. A. Graham against J. D. Spreckels & Bros. Company and the Southern Pacific Company to recover damages for the alleged conversion of the capital stock and bonds of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, which the plaintiff claims were pledged to Spreckels & Bros. Company to secure a debt, and by such company unlawfully sold and transferred to the defendant Southern Pacific Company.

The defendants have answered separately; they each deny the material allegations of the complaint and plead as affirmative and separate defenses first: the contract and circumstances under which the defendant Spreckels & Bros. Company obtained possession of the stock and bonds in controversy which they claim vested the title thereto in such company.

Second: That by reason of certain proceedings had in a suit brought by Spreckels & Bros. Company against the Coos Bay, Roseburg & Eastern Railroad & Navigation Company and the plaintiff, in this court, the plaintiff is estopped to set up or claim title to the shares of stock in controversy in this action.

Third: That the action is barred by the statute of limitations because Spreckels & Bros. Company obtained possession of the stock and bonds in controversy in December, 1899, and they and their co-defendant have ever since been in possession thereof, claiming to be the absolute owners.

Fourth: That plaintiff is estopped from maintaining this action because a few days after Spreckels & Bros. Company obtained possession of the stock and bonds, they took physical possession of the properties of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and a short time thereafter brought suit in this court against such company and the plaintiff herein for a decree requiring the transfer to it of the stock on the books of the company, in which suit and one brought in the same court by the Farmers' Loan & Trust Company a Receiver was appointed for the

property of the Railroad Company; that Spreckels & Bros. Company, assuming and believing that it was the beneficial owner of the railroad company because of its ownership of the stock and bonds, advanced to the Receiver \$203,029.09 for additions and betterments; and that the defendant Southern Pacific Company, relying upon the apparent ownership of Spreckels & Bros. Company, purchased the stock and bonds together with other property from it for \$1,300,000, without notice of any claim thereto by plaintiff.

Fifth: A counterclaim covering the amount of the alleged debt from the plaintiff to Spreckels & Bros. Company together with the \$203,029.09 which it advanced to the Receiver for additions and betterments.

Sixth: The defendant Southern Pacific Company is a purchaser of the stock and bonds in controversy from Spreckels & Bros. Company for a valuable consideration in good faith and without knowledge or notice of plaintiff's alleged claim thereto or interest therein.

The plaintiff demurred to each of these further and separate defenses on the ground that the facts therein stated do not constitute a defense to this action. I shall not attempt to state the facts, as disclosed by the pleadings, but merely the conclusions to which I have arrived, without elaboration.

The defendants claim that upon the facts stated in the complaint and the averments of the answer the plaintiff is not entitled to maintain this action, assuming that the transaction between him and Spreckels &

Bros. Company was a mortgage or pledge and not a sale. Their position is that his remedy is not for the conversion of the stock or bonds but a special action on the case for breach of the alleged mortgage contract, or a suit in equity to redeem the property alleged to have been converted, or a suit for an accounting; and that he cannot maintain any of these proceedings without first tendering the amount of the debt which he claims to be due and owing to Spreckels & Bros. Company.

There is a conflict in the decisions as to whether the pledgor of property hypothecated for the payment of a debt, and which has been sold or disposed of by the pledgee, can maintain an action of trover against either the pledgee or his assignee in interest, without first tendering the debt to secure which the property was pledged.

31 Cyc., 840.

22 A. & E. Enc. of Law, 875 and 879.

LaCombe v. Forstall's Sons, 123 U. S. 562.

The question was carefully considered by the Court of Appeals of the 8th Circuit in *Rush vs. First National Bank* (71 Fed. 102), and the rule there stated to be that where the property which is held in pledge has been sold or transferred to an innocent third party, the pledgor will not be permitted to maintain an action against the innocent transferee without tendering the amount of the debt for which the property was originally pledged, or so much thereof as remains unpaid. Nor will he be permitted to bring such an action against the pledgee where the transfer of the property by the

latter to a third party was not made under such circumstances as amounted in law to a conversion. Where, however, the tortious act of the pledgee amounts to a conversion, as where he has surrendered the securities to a third party to be canceled, or where he has placed them beyond his reach and is unable to restore them, an action may be maintained by the pledgor against the pledgee without an antecedent tender or a demand that they be returned to him. But in such action the pledgee may recoup as against the pledgor any balance of the debt that is due to him from the pledgor.

The view I have taken of the other questions in the case render it unnecessary for me to decide the question suggested at this time, and for the purposes of this case, I shall assume that the action is properly brought.

The demurrer to the first further and separate defense pleaded in the answer of each of the defendants should be overruled. The contract of June 8, 1899, therein set out, contains diverse and sundry provisions, and I shall not assume to state its contents in detail. In my judgment it was, as stated therein, "for the purpose of completely adjusting all differences" between the contracting parties, and did not constitute a continuing security for the payment of a debt due the defendant Spreckels & Bros. Company from the plaintiff. The bonds and a large part of the stock now in controversy had theretofore been pledged by the plaintiff to Spreckels & Bros. Company as security for moneys advanced by them to the plaintiff to enable him to proceed with the construction of the railroad. At the time

of the execution of the contract of June 8, 1899, a suit to enforce a lien against the pledged property was pending and on trial in the courts of California. Other suits and actions were pending between the parties in the courts of Oregon and California and diverse claims were made by one against the other. The manifest purpose of the agreement was to settle these disputes and all litigation then pending. By its terms and in pursuance thereof, the stock and bonds now in controversy were assigned and transferred by the plaintiff and Spreckels & Bros. Company to the Bank of California as trustee, to be by it delivered to the plaintiff in case he should pay to the bank for the use and benefit of Spreckels & Bros. Company, \$550,000 within six months from the date of such agreement, time being made the essence of the contract, and if he failed to make such payment the bank was to transfer and deliver the stock and bonds to Spreckels & Bros. Company. The plaintiff failed to make the payment as stipulated and the stock and bonds were thereupon assigned and transferred by the Bank to Spreckels & Bros. Company and they thus obtained an absolute title thereto. I do not think the parties intended to continue the relation of debtor and creditor or that the property should thereafter be considered in any way as a continuing security for the payment of a debt due from plaintiff to Spreckels & Bros. Company. No such intention is to be found in the terms of the agreement or the circumstances surrounding it. Its whole scope and tenor precludes the theory that another mortgage or pledge was intended. The object of the suit then pending in the California

court was to put an end to that relation by foreclosure and sale of the pledged property. The agreement of settlement was designed to effect that purpose by the action of the parties without the aid of the court. It was intended to dissolve the relation of debtor and creditor, and not to create or continue an equity of redemption in the plaintiff. For that purpose and to that end the parties were to and did transfer to the bank as trustee all their interests in the property now in controversy. The bank therefore became, in a sense, the agent and representative of both parties to hold the property and deliver it to the plaintiff if he complied with the terms of the agreement and made the payment within the time specified and if not, to deliver it to Spreckels & Bros. Company. The plaintiff was given an option to so acquire the property by the payment of a stipulated sum within a definite time. There was no obligation, however, upon his part to make such payment nor could he have been compelled to do so. It was a mere right or privilege which he could exercise or not, according to his own judgment. Time was made the essence of the contract and it was expressly stipulated that in case of the failure of the plaintiff to make the payment within the time specified the title to the property "shall vest in and the same shall become the absolute property" of Spreckels & Bros. Company.

I conclude, therefore, that the matter pleaded in the first further and separate defense constitutes a complete defense to this action. This conclusion renders immaterial the other matters pleaded in the answer. How-

ever, for the purpose of the record, I shall indicate my views in reference to them.

The demurrer should be sustained as to the second, third and fourth defenses. There is no averment that any decree was ever entered in the suit brought by Spreckels & Bros. Company against the railroad and Graham in this court, or that the stipulation signed by Graham was ever acted upon by either party, and therefore such proceeding could not have the effect of an adjudication that the title to the stock was in Spreckels & Bros. Company, or estop Graham from contesting that position. The answer shows that the conversion, if any, by Spreckels & Bros. Company of the stock and bonds alleged by the plaintiff to have been delivered to it as a pledge or security for the payment of a debt, did not occur until July, 1906. This action was commenced in 1907, and is therefore not barred by the statute of limitations, assuming the plaintiff's theory to be correct.

The matters pleaded in the fourth defense do not, in my opinion, constitute an estoppel.

The demurrer to the fifth defense should be overruled. If the transaction between the plaintiff and the defendant Spreckels & Bros. Company constituted a mortgage or pledge, as the plaintiff claims, the defendant clearly has a right to plead as a counterclaim or set-off the amount of the debt to secure which the property was pledged and which remains unpaid. The claim for \$203,029.09 for moneys advanced by Spreckels & Bros.

Company to the Receiver would not, however, constitute a counterclaim or set-off.

The demurrer to the plea of the Southern Pacific Company that it was a purchaser in good faith and without notice should be overruled. The facts therein stated, if true, are sufficient to constitute such defense.

The demurrer will, therefore, be overruled as to the first and fifth separate defenses, and also to the plea of the bona fide purchaser, and will be sustained as to the second, third and fourth defenses.

Filed April 18, 1910.

G. H. MARSH, Clerk.

*In the District Court of the United States for the
District of Oregon.*

And afterwards, to-wit, on Monday, the 17th day of January, 1916, the same being the 67th judicial day of the regular November, 1915, term of the District Court of the United States for the District of Oregon; Present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

ORDER TO FILE AMENDED COMPLAINT.

Now at this time comes on to be heard the motion of plaintiff for leave to file an amended complaint, plaintiff appearing by Messrs. Martin L. Pipes and George A. Pipes, and defendants appearing by Messrs. Wm.

D. Fenton and Alfred A. Hampson, and the court being duly advised in the premises, over the objections of the defendants, hereby orders that said leave be granted and that plaintiff be permitted to file the said amended complaint, to which order the defendants are allowed an exception.

And afterwards, to-wit, on the 17th day of January, 1916, there was duly filed in said Court and cause, an Amended Complaint, in words and figures as follows, to-wit:

AMENDED COMPLAINT.

Now comes the plaintiff in the above entitled action and after leave of the Court obtained, files this his Amended Bill of Complaint against the defendants and for cause of action alleges that:

I.

On or about the 18th day of August, 1890, the Coos Bay, Roseburg & Eastern Railroad & Navigation Company was incorporated under the laws of the State of Oregon for the purpose of building a railroad from a point on Coos Bay in the State of Oregon via Roseburg, to the Eastern line of the State of Oregon. The capital stock of said corporation was Two Million (\$2,000,000.00) Dollars divided into Twenty Thousand (20,000) shares of the par value of One Hundred (\$100.00) Dollars each of which Nineteen thousand nine hundred and ninety-four (19,994) shares were subscribed for by one O. J. Seeley. Immediately there-

after plaintiff became the owner of said Nineteen thousand nine hundred and ninety-four (19,994) shares of stock and said number of shares was issued to this plaintiff.

On August 19th, 1890, plaintiff above named entered into a contract with the Coos Bay, Roseburg & Eastern Railroad & Navigation Company to construct and equip said railroad from Marshfield in the State of Oregon to Roseburg in the same State, in consideration of receiving therefor the first mortgage bonds of said Railroad Company at the rate of Twenty-five Thousand (\$25,000.00) Dollars per mile of constructed road together with all subsidies, subscriptions and guaranties, made by individuals and corporations to aid in the construction of said railroad. Thereafter the plaintiff proceeded to build said railroad and eventually completed the same from Marshfield, Oregon, to Myrtle Point, Oregon, a distance of about twenty-seven (27) miles.

II.

Soon after plaintiff secured the contract for the building of said railroad, plaintiff entered into negotiations with the defendant J. D. Spreckels & Bros. Company, whereby the said defendant was to finance the building of said railroad and to provide funds for financing the expenses and expenditures of the plaintiff and was, in return therefor, to be entitled to charge a bonus on advances made after certain dates, as hereinafter referred to, and was likewise to receive commissions on the sales of bonds of said railroad company, and on or

about the 3rd day of September, 1892, plaintiff and the defendant J. D. Spreckels & Bros. Company made and entered into a contract setting forth their agreement, which said contract was as follows:

“The understanding and agreement between the undersigned is as follows:

“That in consideration of certain advances made by J. D. Spreckels & Bros. Company to R. A. Graham, for the purpose of enabling said R. A. Graham to pursue the construction of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company from Marshfield to Myrtle Point, as per his contract with said railroad, said Graham is to deposit in the hands of Messrs. J. D. Spreckels & Bros. Company, all the bonds of said railroad issued and to be issued from number one (1) to and including six hundred and sixty-three (663), also the majority of the stock in said railroad corporation, as security for advances made by Messrs. J. D. Spreckels & Bros. Company; interest at seven per cent per annum to be charged on the entire account, and five per cent bonus on advances on or after September 3, 1892.

“It is further agreed that any negotiations for sale of bonds, shall be deducted from Messrs. J. D. Spreckels & Bros. Company, who are to receive ten per cent commission on gross receipts of such sale; and are also to receive ten per cent commission on amount of profit in cost of construction of said

road from Myrtle Point to Roseburg, should said R. A. Graham or his assigns perform the work.

J. D. SPRECKELS & BROS. COMPANY,
F. S. Samuels."

III.

Plaintiff pursuant to his contract with said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, entered upon the active construction of said road and carried the same to completion from Marshfield to Myrtle Point. Pursuant to the contract set forth in Paragraph II hereof, the plaintiff delivered to the defendant J. D. Spreckels & Bros. Company, a certificate of stock for Ten Thousand and One (10001) shares (being the majority) of the capital stock of said corporation and there was also issued and delivered to said defendant from time to time the First Mortgage Bonds of said railroad company until said defendant had received from the plaintiff six hundred and twenty (620) of said First Mortgage Bonds of the par value of One Thousand (\$1000.00) Dollars each.

IV.

About the time he commenced the construction of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company plaintiff discovered a few miles distant from the line of railroad, a vast deposit of fuel coal and thereupon proceeded to acquire said coal deposit and the surrounding lands under which said coal deposit lay. Thereafter, and prior to the year 1895, the plaintiff made known to the defendant J. D. Spreckels & Bros.

Company, the fact that he had discovered and had under control such coal deposit and lands and the defendant J. D. Spreckels & Bros. Company, as plaintiff is informed and believed and therefore alleges, thereupon determined, unknown to the plaintiff, to secure possession and control of said coal deposits and lands and to carry out said purpose and intent said defendant J. D. Spreckels & Bros. Company represented and stated to the plaintiff that if plaintiff would consent to form a corporation to take over and become the owner of said coal deposits and lands, the plaintiff and the defendant would become owners of an equal number of shares in said corporation and the said defendant would thereafter continue to furnish all moneys necessary to finance the operation of the coal mine to the end that said coal should be market to their joint profit and said defendant further held out as an inducement that plaintiff should be made the manager of the corporation so to be formed and should receive a substantial salary and should continue as the manager of said company to the end that he might develop the same and make as a part of his business for the rest of his life the management of said Company, and did give up his regular business of Railroad Contractor to carry out his contract, the marketing of said coal and the furnishing of freight to the railroad hereinbefore described.

Pursuant to the said representations and inducements plaintiff consented to the formation of said corporation and through the joint act of plaintiff and the defendant J. D. Spreckels & Bros. Company there was incorporated for said purpose a corporation, to-wit:

Beaver Hill Coal Company, with a capital stock of Five Hundred Thousand (\$500,000.00) Dollars, divided into Five thousand (5,000) shares of One Hundred (\$100.00) Dollars each, Twenty-five hundred (2500) of which shares were issued to, stood in the name of and were the property of the plaintiff, R. A. Graham, while the remaining twenty-five hundred (2500) shares belonged to and were the property of the defendant J. D. Spreckels & Bros. Company.

Thereupon said Beaver Hill Coal Company took over and became the owner of all of said coal deposits and lands surrounding the same which had theretofore been discovered and made known to the defendant J. D. Spreckels & Bros. Company by the plaintiff.

Pursuant to the proposals theretofore made by the defendant, J. D. Spreckels & Bros. Company, the plaintiff and said Beaver Hill Coal Company entered into an agreement on the 21st day of February, 1896, wherein and whereby it was agreed that the plaintiff should receive as his salary and compensation as such manager the sum of One Hundred and Fifty (\$150.00) Dollars per month in cash, payment thereof to commence February 21st, 1896, and should also receive a sum sufficient to pay the premium on two policies of life insurance for Fifty Thousand (\$50,000.00) Dollars each, which had theretofore been issued by the New York Life Insurance Company on the life of the plaintiff herein. It was further provided and agreed that plaintiff R. A. Graham should endorse and deliver one of said policies of insurance to the defendant, J. D.

Spreckels & Bros. Company, and that said defendant Company would, as a part of the salary of said R. A. Graham, keep the premiums of said policies paid up and in case of the death of the plaintiff herein prior to the maturity of one of said policies, to-wit: No. 664673 the same should be payable to the defendant J. D. Spreckels & Bros. Company as security for any obligations which might then be due by the plaintiff R. A. Graham to said J. D. Spreckels & Bros. Company, but that if said R. A. Graham should survive the maturity of said policy the money due thereon should be payable to the account of and become the property of the plaintiff R. A. Graham. The purpose and intent of the parties to said agreement was that in case the plaintiff should die during the time he was manager of said Beaver Hill Coal Company said J. D. Spreckels & Bros. Company might collect the proceeds of said policy as security for any money which the plaintiff Graham might at the time of such death during such employment owe to the defendant J. D. Spreckels & Bros. Company but that in case the said plaintiff Graham should survive the maturity of said policy the proceeds of said policy were to be the property of the defendant R. A. Graham.

The coal mine of said Beaver Hill Coal Company was located about three miles from the line of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company. The plaintiff relying upon the promises and inducements held out by the defendant, J. D. Spreckels & Bros. Company, constructed out of his own funds and as his individual property, a branch line railroad to connect a coal mine owned by plaintiff, known

as "Klondyke Mine" with the line of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company to furnish freight for said railroad, and said branch line of railroad became known as and will be hereinafter referred to as the Klondyke Spur Railroad. Plaintiff likewise furnished and supplied the rolling stock for said Klondyke Spur Railroad consisting of locomotive and freight cars.

V.

Thereafter on the 1st day of November, 1897, as a result of the various business enterprises in which the defendant J. D. Spreckels & Bros. Company and plaintiff were jointly interested there became due and owing by the plaintiff to the said defendant the sum of Five hundred twenty-three thousand one hundred sixty-two and 52/100 (\$523,162.52) Dollars and on said date the said defendant demanded of the plaintiff that he settle said indebtedness by executing his promissory note and by delivering to them as security for the payment thereof and as a mortgage, the securities hereinafter referred to and said defendant J. D. Spreckels & Bros. Company assured the plaintiff that upon the execution of said promissory note and the delivery of said security the plaintiff would be aided by the defendant in carrying on said Beaver Hill Coal Company mine and would not be disturbed in the management thereof and would likewise not be disturbed in the management or control of said Coos Bay, Roseburg & Navigation Railroad and would not be interfered with or disturbed as to his interests in said Coos Bay, Roseburg & Eastern and

Navigation Company, or in any other respect. Thereupon on the 1st day of November, 1897, plaintiff yielded to the demands of said defendant J. D. Spreckels & Bros. Company and executed to said defendant his promissory note in the sum of Five hundred twenty-three thousand one hundred sixty-two and 52/100 (\$523,162.52) Dollars in full settlement, acquittance and payment of all indebtedness of every kind and character due by the plaintiff to said defendant. Said promissory note was payable one year from November 1st, 1897, and carried interest at the rate of six (6) per cent per annum payable monthly. Plaintiff protested to defendant that the payment of interest monthly was a great burden upon plaintiff and one which it would be difficult for him to bear but was assured by the said defendant that it was the purpose of said defendant not to embarrass but rather to assist the plaintiff and that no advantage would be taken of any failure to pay interest short of the maturity of said note. Plaintiff as security for the payment of the above note and interest to grow due thereon and as the only collateral and security therefor and as a mortgage delivered to the defendant J. D. Spreckels & Bros. Company Ten thousand and one (10,001) shares of the capital stock of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, six hundred and twenty (620) bonds of the face value of One thousand (\$1,000.00) Dollars each of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company and also a deed intended by the parties to be a mortgage and security only to real property situated in the town of Marsh-

field, Coos County, Oregon, of the value of about Two hundred and fifty thousand (\$250,000.00) Dollars.

At the time of the execution of said note defendant J. D. Spreckels & Bros. Company agreed that it required and would require no further or other security from the plaintiff than that hereinafter in this paragraph alleged to have been transferred as security and said defendant agreed at that time to immediately surrender, transfer and deliver over to the plaintiff the aforesaid policy No. 664673 issued by the New York Life Insurance Company on the life of the plaintiff. Notwithstanding said promise said defendant continued thereafter wrongfully and without right to hold said policy of life insurance and never delivered the same to the plaintiff.

VI.

From the time of completion of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company to Myrtle Point, plaintiff became and was the manager of the said railroad and from the time of the incorporation of Beaver Hill Coal Company plaintiff was manager of said Company. Throughout said respective periods of time plaintiff continued to be such manager and used his utmost efforts to develop said properties and to make them paying investments and devoted his utmost energies throughout said years in an effort to make said respective corporations paying investments for defendant J. D. Spreckels & Bros. Company, and it was understood and agreed throughout said times by the defendant J. D. Spreckels & Bros.

Company and the plaintiff that said plaintiff should continue indefinitely and without interruptions as the manager of said corporations and should be given every opportunity to place the same on a paying basis, it being recognized by the said J. D. Spreckels & Bros. Company that said railroad had been built through the efforts and energies of the plaintiff and the properties of said Beaver Hill Coal Company had been discovered and made known to said defendant by the plaintiff. And throughout said entire period and down to and including the time that the plaintiff executed said promissory note for Five hundred twenty-three thousand one hundred sixty-two and $52/100$ (\$523,162.52) Dollars on November 1st, 1897 and at the time of the execution of said note, defendant J. D. Spreckels & Bros. Company assured the plaintiff that he would receive full and adequate financial assistance and support of the said defendant. It was understood and agreed between the plaintiff and defendant J. D. Spreckels & Bros. Company at the time of the execution of said promissory note on November 1st, 1897, that plaintiff was thereby conveying ample securities to said defendant company to secure all of the plaintiff Graham's indebtedness and it was specifically agreed and understood between plaintiff and said J. D. Spreckels & Bros. Company at the execution of said note and as a part of the consideration for the execution of the same that said plaintiff Graham should not be embarrassed or disturbed in the management of Beaver Hill Coal Company or in any of his interests in said railroad.

VII.

Defendant J. D. Spreckels & Bros. Company, unknown to plaintiff, was at the time of the execution of said note hereinbefore referred to, planning and devising means to secure exclusive possession and control of all the stock of Beaver Hill Coal Company and of Coos Bay, Roseburg & Eastern Railroad & Navigation Company to the end that said defendant might thereafter operate as its exclusive property both of the said companies and their respective plants and would be in position to sell or dispose of the same at enormous profit without being required to divide said profit with plaintiff, and plaintiff avers that at the time of the execution of said promissory note and for some time prior thereto said defendant J. D. Spreckels & Bros. Company had been planning and devising means to bring about the financial ruin of the plaintiff, so that he might be unable to redeem any of said stocks, bonds or other securities. To the end that said plan might be carried out by the defendant, plaintiff alleges that immediately after securing from the plaintiff the aforesaid promissory note of November 1st, 1897, defendant J. D. Spreckels & Bros. Company well knowing that plaintiff was financially embarrassed and would be unable to pay said note or the interest thereon if disturbed as manager of said Beaver Hill Coal Company and with the purpose of accomplishing the financial ruin of the plaintiff, of securing possession of all of his property and for the purpose in part of securing possession and control of the capital stock and bonds of Coos Bay, Roseburg & Eastern Railroad & Navigation Company and the stock

of said Beaver Hill Coal Company, demanded of the plaintiff that he forthwith resign as the manager of Beaver Hill Coal Company and on the 3rd day of December, 1897, without giving plaintiff an opportunity to be present at the Board of Directors' meeting of said Company and without cause, notice or warning, defendant J. D. Spreckels & Bros. Company caused the directors of said Beaver Hill Coal Company (all said directors being officers or servants of J. D. Spreckels & Bros. Company) to discharge said plaintiff as manager of Beaver Hill Coal Company and revoked all the power and authority which had theretofore been conferred on plaintiff to act for said Beaver Hill Coal Company, in the State of Oregon, and by a resolution passed on said December 3rd, 1897, withdrew from the plaintiff all power and authority whatsoever to act for said Company and did thereby revoke the salary which it had theretofore been agreed should be continually paid to the plaintiff; and the defendant J. D. Spreckels & Bros. Company caused said Beaver Hill Coal Company to thereupon appoint one Chandler servant and employee of said J. D. Spreckels & Bros. Company in control of all the properties of said Beaver Hill Coal Company and said defendant thereupon through said Chandler closed said mining property, shut down all coal operations, discharged all employees, and forthwith stopped all further production and shipment of coal and did thereby deprive Coos Bay, Roseburg & Eastern Railroad & Navigation Company of the freight earnings from said coal amounting to the sum of about One hundred (\$100.00) Dollars per day.

Said earnings from said shipments of coal had been up to that time and were well known by the defendant J. D. Spreckels & Bros. Company to constitute the greater portion of the freight shipped over the line of said railroad and said defendant J. D. Spreckels & Bros. Company well knew at said time that it was necessary that said coal shipments should be sent over said railroad in order to insure an income from the operation of said railroad. It was understood and agreed between plaintiff and defendant J. D. Spreckels & Bros. Company at the time of the formation of Beaver Hill Coal Company that the shipments of coal from said mine would constitute a large part of the earnings of said railroad and that by and through the continuance of said shipments only could said railroad be made a paying investment during the times herein mentioned and until said railroad should develop new sources of freight supply; and it was understood and agreed between plaintiff and said defendant that said shipments of coal should continue over said railroad in order that said railroad should have a steady source of income and in order that the plaintiff who was the owner of practically all of the capital stock of said railroad should be able to derive an income therefrom and thereby pay to the defendant J. D. Spreckels & Bros. Company the money due to them by the plaintiff.

Said acts of said Beaver Hill Coal Company deprived plaintiff of his entire income of every kind and character and said facts was well known at said time to defendant J. D. Spreckels & Bros. Company, and plaintiff avers that without the salary which it had been

agreed he should receive as manager of said Beaver Hill Coal Company and the earnings of said railroad derived from said coal shipments the plaintiff could not and defendant J. D. Spreckels & Bros. Company well knew that plaintiff could not pay the interest on the aforesaid promissory note of Five hundred twenty-three thousand one hundred sixty-two and 52/100 (\$523,162.52) Dollars; and plaintiff alleges that defendant J. D. Spreckels & Bros. Company purposely caused the removal, without cause, of said plaintiff, and the shutting down of said mine for the purpose of accomplishing the financial ruin of plaintiff and securing to said J. D. Spreckels & Bros. Company, pursuant to its plan, the exclusive control of said railroad and coal companies, the real property at Marshfield, said insurance policy for Fifty thousand (\$50,000.00) Dollars and all other properties conveyed as security for the payment of said note. Plaintiff further avers that immediately after the removal of plaintiff as manager of said Beaver Hill Coal Company and with the purpose of still further financially embarrassing the plaintiff and insuring his financial ruin, in order that he might not be able to redeem any of said properties and in order that said J. D. Spreckels & Bros. Company might secure the ownership and control of the aforesaid Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and said Beaver Hill Coal Company, caused said Beaver Hill Coal Company (of which said defendant had control) to commence an action in the Superior Court of the City and County of San Francisco against the plaintiff for an accounting and

for judgment for a large sum of money and the defendant further brought action against the Coos Bay, Roseburg & Eastern Railroad & Navigation Company in the District Court of the United States for the District of Oregon for the purpose of having a receiver appointed for said railroad and of preventing the plaintiff Graham from having any further control or management thereof, but particularly with a view to further embarrassing the plaintiff financially and preventing him from earning money with which to redeem the stocks and bonds of said railroad company and the stock of said coal company theretofore pledged to the said defendant J. D. Spreckels & Bros. Company.

Because of the aforesaid actions of the defendant J. D. Spreckels & Bros. Company in discharging him as manager of said coal company, stopping his salary as manager thereof; shutting down said mine, shutting off the earnings of said railroad, entangling said railroad in costly and expensive litigation for the appointment of a receiver and in the other actions hereinbefore alleged, plaintiff was completely deprived of all income and was unable to pay the interest on the aforesaid promissory note from and after the 1st of April, 1898, although he continued to pay until said date. And thereupon and with the purpose of completing the financial ruin of the plaintiff and insuring to the defendant J. D. Spreckels & Bros. Company the complete and absolute control of all the stocks, bonds and other properties transferred as security for the payment of the promissory note and the companies in which they were issued and on the 13th day of June,

1898, defendant J. D. Spreckels & Bros. Company commenced an action in the Superior Court of the City and County of San Francisco, State of California, to recover from the plaintiff the full principal sum of Five hundred twenty-three thousand one hundred sixty-two and 52/100 (\$523,162.52) Dollars with interest from April 1st, 1898, and prayed therein that said securities transferred with the said note as hereinbefore alleged, including the stocks and bonds of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company and stock of said Beaver Hill Coal Company might be sold and the plaintiff be barred of all right to redeem the same.

To further secure possession and control of Beaver Hill Coal Company and more completely insure the financial ruin of the plaintiff and thereby to prevent plaintiff from ever again securing possession of the stocks and bonds of said railroad and coal companies, hereinabove referred to, defendant J. D. Spreckels & Bros. Company did cause its secretary, without authority and in violation of law, to sign the name of plaintiff Graham to the certificates of stock owned by the plaintiff Graham in Beaver Hill Coal Company which said stock was then in the possession of the defendant J. D. Spreckels & Bros. Company. Said signing was without the authority from or any knowledge on the part of plaintiff and with a view to hindering and impeding plaintiff in securing control of said stock.

VIII.

By the various acts of the defendant hereinbefore alleged on the part of J. D. Spreckels & Bros. Company plaintiff was financially oppressed, was deprived of all income and means of making payments and all of his property was by said acts of said defendant involved in litigation and plaintiff was brought to the brink of financial ruin.

About the 10th day of April, 1899, defendant J. D. Spreckels & Bros. Company brought on for trial in the City and County of San Francisco the aforesaid action brought to secure judgment on said promissory note for Five hundred twenty-three thousand one hundred sixty-two and 52/100 (\$523,162.52) Dollars and while said cause was being tried and while plaintiff was financially embarrassed and involved in the greatest financial distress and was pressed by the various actions caused to be instituted by defendant J. D. Spreckels & Bros. Company there was entered into between plaintiff and defendant J. D. Spreckels & Bros. Company a certain agreement dated June 8th, 1899, a copy of which is hereunto attached marked Exhibit "A," and made a part hereof as fully and completely as if set forth herein. Said agreement was entered into by plaintiff at a time when he was being harassed, annoyed and persecuted by the defendant J. D. Spreckels & Bros. Company with the various actions hereinbefore alleged and while he was threatened with financial bankruptcy and was harassed by the constant demands and exactions of the defendant J. D. Spreckels & Bros.

Company. Said agreement set forth in Exhibit "A" was entered into by the plaintiff for the purpose of enabling him to secure time within which to settle his obligations at a fixed time in the future and of securing to him an opportunity to settle his obligations in the future and plaintiff was advised by his counsel who was an attorney at law that in making said agreement a failure on his part to comply with the provision requiring payment of Five hundred and fifty thousand (\$550,000.00) Dollars would not forfeit plaintiff's title to the various bonds, stocks, securities, deeds to other properties therein mentioned but that said properties theretofore conveyed to defendant as security would merely be held as continuing security and that defendant J. D. Spreckels & Bros Company could not under any state of facts claim under any breach of said instrument to be the owners of any of said property or securities and plaintiff verily believed said advice at the time of signing said instrument and at all time thereafter. Before defendant J. D. Spreckels & Bros. Company would give its consent to making the said contract of June 8th, 1899, plaintiff was by said defendant compelled, in order to secure the same, to include in said instrument, as further security for the defendant, J. D. Spreckels & Bros. Company, the transfer by said agreement of what is known as the said Klondike Spur Railroad leading from the line of Coos Bay, Roseburg & Eastern Railroad & Navigation Company to what is known as the Klondike Mine, together with all interest in the rolling stock of said railroad, said railroad spur being of the value of and having cost

the plaintiff Graham in excess of the sum of Fifty thousand (\$50,000.00) Dollars, and was further compelled to agree to the surrender of all his stock in the Beaver Hill Coal Company which was of great value; and also, in order to secure the return of said policy of life insurance No. 664673 hereinbefore referred to plaintiff was compelled to agree that he would pay to the defendant J. D. Spreckels & Bros. Company a further sum of Twenty-nine hundred and fifty (\$2950.00) Dollars, notwithstanding said policy was at that time wrongfully withheld from plaintiff by defendant J. D. Spreckels & Bros. Company.

IX.

At the time said agreement of June 8th, 1899, was signed by plaintiff he was by said acts of the defendant J. D. Spreckels & Bros. Company, as hereinbefore alleged, financially crippled, deprived of his income, without the power to dispose of his property, was the defendant in the various legal actions commenced by and on behalf of defendant J. D. Spreckels & Bros. Company as hereinbefore alleged; was oppressed, harassed and distracted by the demands and exactions of said defendant J. D. Spreckels & Bros. Company and said defendant well knowing said facts to be true purposely and designingly and with intent to secure plaintiff's property threatened that it would drive the plaintiff into bankruptcy and financial ruin unless the plaintiff included in said instrument all of the properties set forth therein.

Within the six months period provided for payment in said agreement of June 8th, 1899, plaintiff secured an agreement with the Southern Pacific Company defendant herein through Collis P. Huntington, its President, and George Crocker, its Vice-President, by which said Southern Pacific Company was to pay and advance the sum of Five hundred fifty thousand (\$550,000.00) Dollars, provided for in said agreement, thereby to enable the plaintiff to secure possession of all his property mentioned in said agreement, and thereby to enable said defendant Southern Pacific Company to purchase from plaintiff the interest in and ownership of the plaintiff in said Coos Bay, Roseburg & Eastern Railroad & Navigation Company; for a consideration greatly in excess of Five hundred fifty thousand (\$550,000.00) Dollars, but plaintiff avers that said defendants J. D. Spreckels & Bros. Company wrongfully and with the intent and purpose of preventing the plaintiff from making said payment or securing said money and with the purpose of preventing the plaintiff from ever being able to secure possession of his properties described in said agreement of June 8th, 1899, and in order that defendant J. D. Spreckels & Bros. Company should be able wrongfully to secure possession of all the properties of the plaintiff Graham set forth in said contract and thereafter to sell them to the Southern Pacific Company for a much greater figure for the benefit of defendant J. D. Spreckels & Bros. Company persuaded defendant Southern Pacific Company and Collis P. Huntington, President thereof, and George Crocker, Vice-President thereof, not to pay said sum

of money as agreed by said Southern Pacific Company and fraudulently and wrongfully represented and stated to defendant Southern Pacific Company and to Collis P. Huntington, President thereof, and George Crocker, Vice-President thereof, that all of plaintiff Graham's interests and property were hopelessly involved in entangled litigation and that by paying said sum of Five hundred and fifty thousand (\$550,000.00) Dollars said Southern Pacific Company would be merely purchasing a series of complex law-suits and that plaintiff Graham could not convey or cause to be conveyed any right to either the stock or bonds of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company or any other properties mentioned in said agreement of June 8th, 1899, and said defendant J. D. Spreckels & Bros. Company did further fraudulently and wrongfully represent and assert to defendant Southern Pacific Company and its officers aforesaid, that if said Southern Pacific Company would withhold the said payment as agreed and promised by said Company and would refuse to make any payments to the plaintiff Graham in order to enable the said plaintiff to carry out his part of said contract of June 8th, 1899, that said defendant J. D. Spreckels & Bros. Company would thereby secure control and possession of all of the properties of said Graham set forth in said agreement and in particular the stocks and bonds of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company and that upon the expiration of said six months period said J. D. Spreckels & Bros. Company would sell the same to defendant Southern Pacific Company at a fig-

ure agreeable to both parties, but that if defendant Southern Pacific Company or its aforesaid officers should pay said sum of Five hundred fifty thousand (\$550,000.00) Dollars to said plaintiff Graham the defendant J. D. Spreckels & Bros. Company would complicate and entangle said properties in long and expensive litigation.

Because of said fraudulent and wrongful representations, statements and threats defendant Southern Pacific Company and its officers, aforesaid, were deterred and prevented from making the said payment of Five hundred and fifty thousand (\$550,000.00) Dollars as agreed whereby the plaintiff would have been enabled to make the payments and secure possession of his property and by virtue of said fraudulent and wrongful actions on the part of the said defendant J. D. Spreckels & Bros. Company and consequent failure and refusal of defendant Southern Pacific Company to advance said moneys plaintiff was prevented from and was unable to make the said payment of Five hundred and fifty thousand (\$550,000.00) Dollars; and defendant J. D. Spreckels & Bros. Company on the expiration of said six months period provided for in said contract on June 8th, 1899, demanded from the Bank of California, the trustee therein named, and secured the possession of the stock and bonds of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company and other securities deposited under said agreement.

Said agreement of June 8th, 1899 (Exhibit "A") was never consummated or completed in accordance

with the terms thereof, and never became effective between the parties for the following reasons:

(a) There was never delivered to the plaintiff a release executed by Beaver Hill Coal Company releasing and discharging plaintiff Graham from any claims and demands held against said Graham by Beaver Hill Coal Company as provided in paragraph 2 of said agreement.

(b) There was never delivered to the trustee provided in said agreement the resignations of the directors Thomas Sheridan and J. W. Bennett, as provided in subdivision "B," paragraph 6 of said agreement.

(c) There were never transferred or issued to William L. Pierce, J. W. Bennett, Frederick S. Samuels, W. S. Chandler, S. W. Hazard, R. A. Graham or Thomas R. Sheridan any shares of the capital stock of Coos Bay, Roseburg & Eastern Railroad & Navigation Company endorsed or otherwise, as required by Section 6 of said agreement.

(d) No meeting of the directors of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company was called for the reorganization of the board of directors of said Company, nor was there any election of directors as provided by paragraph 7 of said agreement.

(e) That no resignation of directors was either filed or delivered to said trustees as provided by paragraph 7 of said agreement.

(f) There never was delivered to the plaintiff R. A. Graham a release or discharge of any and all claims and demands which the Coos Bay, Roseburg & Eastern Railroad & Navigation Company held against said R. A. Graham, as provided by subdivision "F," paragraph 10 of said agreement.

(g) That there never was delivered to the plaintiff R. A. Graham satisfaction of the judgment as provided by subdivision "F," paragraph 10 of said agreement.

Notwithstanding said agreement of June 8th, 1899, never took effect for the reasons hereinbefore set forth, the trustee in said agreement, Bank of California, delivered to defendant John D. Spreckels & Bros. Company all of the stock, bonds and other collateral named in said agreement and defendant J. D. Spreckels & Bros. Company took possession thereof contrary to the protest of the plaintiff.

Thereafter and on or about the 15th day of December, 1899, defendant J. D. Spreckels & Bros. Company by force of arms and fraudulently and wrongfully seized and took physical possession of all the rolling stock, offices, books, papers and documents of Coos Bay, Roseburg & Eastern Railroad & Navigation Company and holding possession thereof by armed force and through a body of detectives and armed men held a fraudulent and purported election of directors without a quorum of either stockholders or legally elected directors present and it thereupon thereafter on July 2, 1906, caused the stock of this plaintiff to

be transferred to the name of defendant J. D. Spreckels & Bros. Company, and it did thereupon sell and convert to its own use the stock and bonds of this defendant, to-wit: twenty thousand (20,000) shares of the capital stock, of the par value of One hundred (\$100.00) Dollars each, of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company and six hundred and twenty (620) bonds of said Railroad Company of the face value of One thousand (\$1,000.00) Dollars each to the Southern Pacific Company for the sum of One million two hundred thousand (\$1,200,000.00) Dollars. That is to say: Said sale was for \$1,300,000.00, but included other personal property of the value of and agreed by the parties to be of the value of One hundred thousand (\$100,000.00) Dollars. Said twenty thousand (20,000) shares of capital stock of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company were prior to and on the date of the sale thereof, to-wit, on the 2nd day of July, 1906, of the reasonable value of Thirty (\$30.00) Dollars per share and of the reasonable aggregate value of Six hundred thousand (\$600,000.00) Dollars and said bonds were of the reasonable aggregate value of Six hundred twenty thousand (\$620,000.00) Dollars.

Plaintiff alleges that the defendant Southern Pacific Company had full knowledge and notice of plaintiff's ownership of said stocks and bonds and of his rights and interests therein and knowingly took possession and purchased said stocks and bonds with full notice of the rights of the plaintiff thereto and ever since has continued to hold and retain the use and control

of said stocks and bonds, and both defendants have refused to deliver the same to the plaintiff although repeated demands were made therefor prior to the commencement of this action.

XI.

There has been no accounting between plaintiff and defendant J. D. Spreckels & Bros. Company since the making of said promissory note for Five hundred twenty-three thousand one hundred sixty-two and 52/100 (\$523,162.52) Dollars on the 1st day of November, 1897, arising out of any of the enterprises herein referred to and said defendant has at all times refused to render any accounting to the plaintiff relating to any of the transactions or investments hereinbefore in this Bill of Complaint alleged, notwithstanding repeated demands have been made upon said defendant J. D. Spreckels & Bros. Company for the same; but plaintiff alleges that the sum of money derived by the defendant J. D. Spreckels & Bros. Company from the sale of the plaintiff's stocks and bonds, hereinbefore mentioned to the defendant Southern Pacific Company, to-wit, twenty thousand (20,000) shares of the capital stock and six hundred and twenty (620) bonds of said railroad company was at least Six hundred twenty-five thousand (\$625,000.00) Dollars in excess of all sums of every kind and character due by the plaintiff to the defendant J. D. Spreckels & Bros. Company at any time herein mentioned and at the time of the sale of said stocks and bonds to defendant Southern Pacific Company.

XII.

Plaintiff is now ready, willing and able to pay to the defendant any sum which may be adjudged and declared by the above entitled Court to be due from plaintiff to defendant J. D. Spreckels & Bros. Company, and plaintiff hereby offers to pay the sum which may be necessary to extinguish any obligation due by plaintiff to said defendant, upon the return of said stocks and bonds and other securities, and plaintiff is ready, willing and able to redeem said stocks and bonds hereinabove referred to and converted by defendants from any obligation due the plaintiff.

XIII.

Plaintiff has not been guilty of laches in the prosecution of this action and in support of said allegation plaintiff alleges: That he commenced this action by filing the original complaint herein in the Circuit Court of the State of Oregon, for the County of Coos, on the 7th day of December, 1907. Thereafter said action was on motion of the defendants transferred to the Circuit Court of the United States for the District of Oregon and thereafter by statute abolishing said Circuit Court said action was transferred by law to the United States District Court in and for the District of Oregon. Thereafter the defendants filed voluminous answers in this action. Plaintiff filed demurrers on the 18th day of April, 1910, to said answers and much time was consumed in the argument and filing of briefs on the legal questions thereby raised. There-

after certain of the demurrers to the answers were sustained and certain demurrers overruled. The plaintiff filed replies to the answers of the defendants and thereafter said defendants filed a motion for judgment on the pleadings. Said motion likewise was submitted on extensive briefs and much time was consumed in the proper and orderly presentation of said briefs to the Court in order that the same might be determined. Said motion for judgment on the pleadings was overruled on the 16th day of March, 1914. Thereafter defendants applied to the Court for a rehearing on said motion. Plaintiff on receiving notice of the overruling of said motion by defendants for judgment on the pleadings promptly proceeded to have the above-entitled action set for trial and has at all times since said action was commenced by him been diligently endeavoring to have said case determined on its merits and employed counsel specially to appear in the above-entitled Court in Portland during the month of May, 1915, in an endeavor to have said action set for trial. Plaintiff again employed additional counsel for the purpose of having said action brought for trial and during the month of July, 1915, caused additional counsel to go from San Francisco, California, to Portland, Oregon, in an endeavor to have said action set for trial, and thereupon said action was by order of the Court set down for trial on the 6th day of October, 1915. Plaintiff was present in Court on the 4th day of October, 1915, with counsel from San Francisco and Portland, prepared to proceed with the trial, but owing to the inability of the Court to proceed said action was by

the order of the Court on said 4th day of October, and without fault of the plaintiff set down for trial on the 10th day of January, 1916.

All delays in said action have been brought about by circumstances over which plaintiff has no control. Said action was commenced by E. B. Watson, attorney for the plaintiff and said attorney who had spent much time in familiarizing himself with the facts and law of said action died on or about the 5th day of January, 1915. No other attorney was familiar with the plaintiff's cause of action. Defendants' counsel W. D. Fenton became ill before the death of Mr. Watson, and for a long time thereafter remained in a precarious state of health and was unable to proceed with said action and requested its continuance. Said action was likewise postponed by the order of the Court without any motion of the plaintiff.

XIV.

Defendant J. D. Spreckels & Bros. Company is and at all times herein mentioned has been a corporation organized and existing under the laws of the State of California and doing business in the State of Oregon, and defendant Southern Pacific Company is and at all times herein mentioned has been a corporation organized and existing under the laws of the State of Kentucky and its railroad system, plants, depots and physical properties situated in various States of the Union including the State of Oregon. Plaintiff's full name is Robert Archibald Graham; he is a subject of Great Britain and a resident therein.

Wherefore plaintiff prays for a decree of this Court adjudging and decreeing that the aforesaid capital stock and bonds of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company are and were at the time of their conversion by sale of the defendant Southern Pacific Company the property of the plaintiff subject only to the lien of the obligation due by plaintiff to defendant J. D. Spreckels & Bros. Company; that the sale by defendant J. D. Spreckels & Bros. Company to defendant Southern Pacific Company was an unlawful sale and a conversion of the personal property of the plaintiff; that it be adjudged and decreed that defendant J. D. Spreckels & Bros. Company never became the owner of the aforesaid stocks and bonds but by the agreements hereinbefore alleged held said stocks and bonds only as security for the payments of obligations due by plaintiff and that said stocks and bonds have never been legally sold, foreclosed or disposed of; that there be an accounting between plaintiff and defendant J. D. Spreckels & Bros. Company as to the amounts and obligations and cross-demands between them and that after said amount shall have been ascertained and decreed the plaintiff be given a right to redeem said stocks and bonds and to pay and tender the amount which shall be decreed to be due, if any, in full settlement thereof, and that it be adjudged and decreed that said defendant Southern Pacific Company acquired the same with full notice of plaintiff's rights and title, and that said defendant holds the same subject to all rights and equities of the plaintiff, and plaintiff prays for such other, further and general relief against both

defendants to this action as shall seem to be proper and equitable as between plaintiff and defendants, and for the costs of the above-entitled action.

JOHN L. McNAB,
MARTIN L. PIPES,
Attorneys for Plaintiff.

State of California,
City and County of San Francisco,
Northern District of California.—ss.

R. A. GRAHAM being first duly sworn deposes and says:

That he has both read and heard read the foregoing complaint and knows the contents thereof. That the same is true of his own knowledge except as to the matters therein set forth on information or belief and that as to those matters he believes it to be true.

R. A. GRAHAM.

Subscribed and sworn to before me this 21st day of December, 1915.

LLOYD MACOMBER,
Notary Public in and for the City and County of San Francisco, California.

(Seal.)

EXHIBIT "A."

THIS AGREEMENT, made this 8th day of June, 1899, by and between R. A. GRAHAM, party of the first part, and J. D. SPRECKLES & BROTH-

ERS COMPANY, a corporation, party of the second part, Witnesseth:

That the parties hereto, for the purpose of completely adjusting all matters of difference between themselves, and between each of them and the Beaver Hill Coal Company, a corporation, and the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, a corporation, do hereby agree as follows:

1. That the receivership suit brought by the first party against said Beaver Hill Coal Company, and now pending in the Circuit Court of the United States for the District of Oregon, shall at once be dismissed upon the settlement of the account of W. W. Catlin, receiver of said Company, each party to said suit to bear his own costs; that an order be at once made in said suit directing said receiver to render an account to said Court, and that upon the settlement of said account an order be made removing said receiver; that all proper fees, costs and charges of said receiver and of J. B. Hassett, the former receiver, and all proper certificates issued by said Hassett and said Catlin as said receivers be paid as far as possible out of the funds in the hands of said Catlin, as said receiver when the same are allowed by the said Court; that said receiver shall surrender the possession and custody of all the property of said Beaver Hill Coal Company unto said company; that said company shall remain in the possession of all its said property during the life of this agreement, without interference in any manner by the first party; that the second party will cause proper steps to be taken by the Beaver Hill Coal Company,

so long as it controls the same, for the care and preservation of said property during the life of this agreement; and that the moneys received by said company after the removal of said receiver shall be applied towards the payment of the balance, if any, remaining due for said fees, costs and charges of said Hassett and Catlin, as said receivers, and on said certificates of said receivers, and also towards the payment of all proper expense incurred in the care and preservation of the property of said company after the removal of said Catlin, as said receiver, and during the life of this agreement.

2. That the suit brought by said Beaver Hill Coal Company against the first party for an accounting, now pending in the Superior Court of the City and County of San Francisco, State of California, shall be at once dismissed, each party thereto to bear his own costs; and that there shall be delivered to the first party, upon the signing of this agreement, a release executed by said Beaver Hill Coal Company, releasing and discharging the first party of and from any and all claims and demands which it may now have or claim to have against him.

3. That the receivership suit brought by the second party against the Coos Bay, Roseburg & Eastern Railroad & Navigation Company now pending in said Court of the United States, for the District of Oregon, shall be at once dismissed, each party thereto to bear his own costs.

4. That a judgment shall be at once entered in the suit brought by the second party against the first party, now pending in said Superior Court of the City and County of San Francisco, State of California (Department No. 3 thereof), numbered 64,541, in favor of the second party and against the first party for the sum of \$523,162.52 together with interest thereon at the rate of six per cent per annum from the 1st day of April, 1898, both in United States gold coin and providing for a sale of the pledged securities sought to be foreclosed in said suit, and with the usual provisions for the docketing of a judgment against the first party for any deficiency which may exist after the sale of the collaterals specified in the original complaint in said suit; that all proceedings to enforce said judgment be stayed for the period of six months after the date of this agreement.

5. That the parties hereto hereby designate and appoint The Bank of California, a corporation, as trustee for them, to hold the properties and written instruments hereinafter mentioned for the purposes hereinafter set forth, and to perform the duties hereinafter prescribed.

6. That the first party shall deliver to said trustee:

a. All of the shares of the capital stock of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company in excess of the 10,001 shares thereof now held by the second party, certificates therefor to be properly endorsed, excepting seven shares thereof

to be issued to the Directors of said Company as hereinafter provided.

b. The resignation of all of the directors of said Company now in office, the same to take effect upon the election of the directors hereinafter named.

c. A release executed by the first party releasing and discharging the said Beaver Hill Coal Company of and from any and all claims and demands which he may now have or claim to have against said Company, said release not to take effect, however, except upon the failure of the first party to pay or cause to be paid to said trustee, for the use and benefit of the second party, the sum of \$550,000.00 gold coin of the United States, as hereinafter provided.

d. A release executed by the first party releasing and discharging the said Coos Bay, Roseburg & Eastern Railroad & Navigation Company of and from any and all claims and demands which he may now have or claim to have against said Company; also a disclaimer of all right, title or interest in or to any of the property of said Company, including the equipments and rolling stock of the railroad, and the spur tracks to the mine of the Beaver Hill Coal Company, and to the mine of the Beaver Coal Company, the same being known as the "Klondike Mine," said release and disclaimer not to take effect, however, except upon the failure of the first party to pay or cause to be paid to said trustee, for the use and benefit of the second party, said sum of \$550,000.00 gold coin of the United States, as hereinafter provided.

That the second party shall deliver to said trustee:

a. The certificate for the 10,001 shares of the capital stock of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company heretofore pledged to the second party by the first party, said certificate to be properly endorsed by the second party.

b. All of the bonds of the said Coos Bay, Roseburg & Eastern Railroad & Navigation Company heretofore pledged by the first party to the second party, and now in its hands, of the par value of \$620,000.00.

c. Assignments, in proper form, to said trustee, of all judgments of record which have been rendered in the courts of Coos County, in the state of Oregon, in favor of the second party, and are now held by it as collateral security for the payment of moneys owing to it by the first party.

d. All of the shares of the capital stock of said Beaver Hill Coal Company, excepting one share thereof to be issued to each one of the present directors of said Company, but said shares of stock issued to said directors shall be duly endorsed and delivered by them to said trustee as soon as possible hereafter, the same to be then held by said trustee together with the other shares of said stock for the uses and purposes hereinafter set forth.

e. A satisfaction, in proper form, and duly acknowledged of said judgment entered in said suit mentioned in paragraph number four of this agreement.

That the first and second parties shall jointly execute and deliver to said trustee a deed to the following described property situate in the Town of Marshfield, in Coos County, Oregon, sufficient in form and substance to vest the title thereto in said trustee, to-wit:

All of blocks numbered one (1), two (2), six (6), eight (8), sixteen (16), twenty-one (21), twenty-eight (28), thirty-three (33), thirty-four (34), thirty-five (35), thirty-six (36), thirty-seven (37), forty-six (46), forty-seven (47), forty-eight (48), forty-nine (49), fifty-two (52), fifty-three (53), fifty-four (54), fifty-seven (57), fifty-nine (59), sixty-three (63), sixty-six (66), sixty-seven (67), seventy (70), seventy-one (71), seventy-five (75), seventy-seven (77), eighty (80), eighty-one (81), eighty-four (84), eighty-five (85), also block lettered "C," also lots one (1) and two (2) and lots eight (8) to forty (40) inclusive, in block numbered fifty-six (56), in "Railroad Addition to Marshfield," according to the plat of said Addition made by G. H. Spencer, and duly recorded in the office of the County Recorder of said Coos County, Oregon.

7. That there shall be transferred and issued to each of the following-named persons, to-wit: William L. Pierce, Frederick S. Samuels, W. S. Chandler, S. H. Hazard, R. A. Graham, J. W. Bennett and T. R. Sheridan, one share of the capital stock of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, which said shares of stock shall be duly endorsed

and delivered by them to said trustee as soon as possible hereafter, the same to be then held by said trustee together with the other shares of said stock for the uses and purposes hereinafter set forth. That a meeting of the directors of said Company shall be called for the reorganization of the Board of Directors of said Company, and at said meeting the persons above named shall be elected to serve as directors of said Company during the life of this agreement, and until their successors are elected and qualified. Upon their election, as such directors, there shall be signed by each of said parties a written resignation of his said office as director, the same to be then delivered to said trustee; such resignation not to take effect, however, except as hereinafter provided.

8. The first party shall remain as manager of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company during the life of this agreement, and subject to the terms hereof. At all times during the life of this agreement the second party shall be entitled to have a representative in the County of Coos, State of Oregon, who shall be permitted at all times, upon demand, to inspect all books, papers and vouchers of every kind connected with the business of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company. Said Company shall be operated during the life of this agreement as a railroad corporation and common carrier of passengers and freight for hire, and shall not be used to further the personal purposes or enterprises of any individual in any manner which will not be to the best interests of said Company, and shall

offer no special advantages in freights or fares, rebates or credits to any individual not granted to the community by general tariff and regulation. It is agreed that the rate of forty cents per ton heretofore fixed for the transportation of the coal of the Beaver Coal Company over said railroad shall not be changed during the life of this agreement.

9. That if, at any time within six months from the date of this agreement, the first party shall pay or cause to be paid to the said trustee, for the use and benefit of the second party, the sum of \$550,000.00 in gold coin of the United States, the title to all of the shares of stock, bonds, real property and judgments below mentioned shall thereupon vest in, and the same shall become the absolute property of the first party; and said trustee is hereby authorized and directed to thereupon deliver to the first party, and the second party hereby obligates itself to cause to be thereupon delivered to him:

a. All of the capital stock of said Beaver Hill Coal Company placed in the hands of said trustee, and all of the shares thereof issued to said directors of said Company, all duly endorsed.

b. All of the capital stock of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, placed in the hands of said trustee, and all of the bonds of said Company placed in the hands of said trustee.

c. A good and sufficient deed of conveyance executed by said trustee to the first party, of the above described real property in said town of Marshfield.

d. Assignments, in proper form, executed by said trustee to the first party, of all said judgments in favor of the second party assigned by it to said trustee, as hereinabove provided, or, if said judgments, or any of them, have been collected by said trustee, then to pay over the moneys collected thereon to the first party.

e. Said satisfaction of said judgment entered in said suit mentioned in paragraph number four of this agreement.

f. The resignations of the following directors of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, to-wit:

WILLIAM L. PIERCE,
FREDERCK S. SAMUELS,
W. S. CHANDLER, and
S. H. HAZARD,

said resignations to then take effect.

g. Said release executed by the first party in favor of said Beaver Hill Coal Company, and said release and disclaimer of the first party in favor of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company.

And said trustee shall at the same time deliver to the second party said sum of \$550,000.00 in gold coin of the United States.

Said payment of said sum of \$550,000.00 in gold coin of the United States to said trustee, for the use

and benefit of the second party, shall operate as a full settlement, satisfaction and discharge of all claims and demands of every kind and nature whatsoever now existing in favor of either party hereto against the other; and of all claims and demands of every kind and nature whatsoever now existing in favor of the second party against said Beaver Hill Coal Company and said Coos Bay, Roseburg & Eastern Railroad & Navigation Company.

The second party further agrees that it will, upon demand of the first party at any time after the payment of said sum of \$550,000.00 to said trustee, execute a proper consent in writing to the cancellation of that certain order heretofore given by said Coos Bay, Roseburg & Eastern Railroad & Navigation Company to the Farmers Loan & Trust Company, directing the delivery by said Farmers Loan & Trust Company to the second party of the bonds of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, as they may be issued from time to time.

10. Should the first party fail to pay or cause to be paid to the said trustee for the use and benefit of the second party, within said six months from the date hereof, said sum of \$550,000.00, in gold coin of the United States, the title to all of the shares of stock, bonds, real property and judgment above mentioned shall, at the expiration of said six months, vest in and the same shall become the absolute property of the second party; and said trustee is hereby authorized and directed to thereupon deliver to the second party:

a. All of the capital stock of said Beaver Hill Company placed in the hands of said trustee, duly endorsed.

b. All of the capital stock of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company placed in the hands of said trustee, and all of the bonds of said Company placed in the hands of said trustee.

c. A good and sufficient deed of conveyance executed by said trustee to the second party of the above described real property in said town of Marshfield.

d. Assignments, in proper form, executed by said trustee, to the second party of all said judgments in favor of the second party assigned by it to said trustee, as hereinabove provided, or, if said judgments, or any of them, have been collected by said trustee, then to pay over the moneys collected thereon to the second party.

e. The resignation of the following directors of the said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, to-wit:

R. A. Graham, T. E. Sheridan and J. W. Bennett, said resignation to then take effect.

f. Said release executed by the said party in favor of said Beaver Hill Coal Company, and said release and disclaimer of the first party in favor of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company.

And said trustee shall at the same time deliver to the first party said satisfaction of said judgment en-

tered in said suit mentioned in paragraph number four of this agreement; and second party shall cause said Coos Bay, Roseburg & Eastern Railroad & Navigation Company to execute and deliver to the first party a release and discharge of any and all claims and demands which it may have or claim to have against the first party. And all matters and things in dispute between the parties hereto, or between the first party and said Beaver Hill Coal Company and said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and all claims and demands shall be and become, by virtue hereof, finally and forever settled and determined.

11. Upon the performance by said trustee of the acts herein-above provided to be done by it, said trust shall cease and determine.

12. The second party further agrees to cause to be executed and delivered by said Beaver Hill Coal Company to said T. R. Sheridan, of Roseburg, Oregon, upon the execution of this agreement, a quitclaim deed to the northeast quarter of section nineteen, township twenty-seven south of range thirteen west of the Willamette Meridian; also to cause to be executed and delivered by A. B. Spreckels (the Vice-President of the second party), to the trustee hereunder, upon the execution hereof, an agreement whereby the first party shall be given the option and right to purchase from said A. B. Spreckels all his right, title and interest in and to that certain real property in said Coos County, Oregon, known as and called the "Chadwick Tract,"

upon the payment by the first party to said A. B. Spreckels of the sum of money paid by said A. B. Spreckels for said right, title and interest in and to said property, together with interest thereon at the rate of six per cent per annum, said agreement for said option not to take effect, however, except in the event that the first party shall pay said sum of \$550,000.00 to said trustee for the use and benefit of the second party within said six months from the date hereof, as hereinabove provided.

13. The second party further agrees that it will re-deliver to the first party that certain policy of life insurance issued to the first party by the New York Life Insurance Company, numbered 664,673, and now held by the second party together with a waiver by it of all claim to or interest in said policy, upon the payment to it by the first party of the sum of \$2950.00, at any time during the life of this agreement.

14. It is mutually agreed that time shall be the essence of this agreement and that this agreement shall inure to the benefit of and shall bind the heirs, executors, administrators, successors or assigns of the respective parties hereto.

IN WITNESS WHEREOF, the first party has hereunto set his hand and the second party has caused its corporate name and seal to be hereunto affixed by its President and Secretary, the day and year first above written.

Done in duplicate.

Witnesses to signature of: R. A. GRAHAM.

R. A. GRAHAM.

J. D. SPRECKELS

ISAAC FROHAM. & BROS. COMPANY.

E. D. PRESTON.

By J. D. Spreckels,
Its President.

Chas. A. Hug,
Its Secretary.

:(Corporate Seal.)

We hereby accept the foregoing trust.

BANK OF CALIFORNIA.

S. S. Smith.

United States of America,
State of Oregon,
County of Multnomah.—ss.

Due service of the within Amended Complaint is hereby admitted in Portland, Oregon, this 24th day of December, 1915.

ALFRED A. HAMPSON,
Of Attorneys for Defendant.

Filed January 17, 1916.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 5th day of April, 1916, there was duly filed in said Court and cause, an Answer of J. D. Spreckels and Bros. Company, in words and figures as follows, to-wit:

ANSWER OF J. D. SPRECKELS & BROS.
COMPANY.

Now comes defendant, J. D. Spreckels & Bros. Company, and answering unto plaintiff's amended complaint on file herein, admits, denies and alleges as follows:

I.

This defendant admits the allegations contained in Paragraph I of said complaint.

II.

Answering unto Paragraph II of plaintiff's complaint this defendant denies that it entered into any negotiations with plaintiff, or that defendant agreed to finance the building of said railroad and to provide funds for financing the expenses and expenditures of the plaintiff, or was to finance the building of said railroad, or provide funds for financing the expenses and expenditures of the plaintiff, and in this behalf defendant denies that it had any agreement, negotiations or understanding with plaintiff in regard to the matters referred to in said Paragraph II of plaintiff's complaint, other than the understanding and agreement which is set forth at the end of said Paragraph II, being a copy of an agreement in writing between plaintiff and this defendant; that said copy of said agreement set forth in Paragraph II is correct with the exception that in the last paragraph of said agreement the words "deducted from" are incorrect, and there should be substituted for the said words the words "conducted by."

III.

This defendant admits the allegations contained in Paragraph III of plaintiff's complaint.

IV.

Answering unto Paragraph IV of plaintiff's complaint, this defendant denies that it, unknown to plaintiff, or otherwise or at all, determined or attempted to secure possession and control, or possession or control, of the coal deposits and lands, or coal deposits or lands, referred to in said Paragraph IV of said complaint; and likewise denies that it represented and stated, or represented or stated, to plaintiff otherwise than hereinafter in this paragraph set forth, that plaintiff and defendant, by means of the formation of a corporation, or otherwise, were to become the owners of the coal deposits and lands, or coal deposits or lands, mentioned in said Paragraph IV of said complaint; and likewise denies that defendant represented and stated, or represented or stated, that plaintiff and defendant would become owners of an equal number of shares of said corporation, except in the manner hereinafter set forth; and likewise denies that defendant represented and stated, or represented or stated, to plaintiff that defendant would thereafter furnish, or continue to furnish, all or any moneys, except as hereinafter set forth, necessary to finance the operation of the coal mine, to the end that said coal mine should be marketed to their joint profit, or otherwise or at all; and defendant denies that defendant held out as an inducement that

plaintiff should be made the manager of the corporation so to be formed, or that plaintiff should receive a substantial or any salary, or that plaintiff should continue as the manager of said corporation, to the end that he might develop the said mine and make as a part of his business for the rest of his life, the management of said company; and denies that there was any agreement that plaintiff should be the manager of said company for any purpose whatsoever; and defendant denies that plaintiff did give up his business of railroad contractor in order to carry out his alleged contract for the marketing of said coal and for the furnishing of freight to the railroad referred to in said complaint; and in this behalf defendant alleges that the only representations and statements and the only agreement had or made by defendant with plaintiff is contained and set forth in a certain agreement in writing dated the 20th day of December, 1894, between plaintiff as party of the first part and this defendant as party of the second part therein, and that said agreement contains the whole of the agreement and understanding, and all the representations and statements between plaintiff and this defendant in reference to the matters referred to in said Paragraph IV of plaintiff's complaint; further replying to said Paragraph IV of the complaint, defendant admits that it consented to the formation of a corporation known and designated as Beaver Hill Coal Company, but denies that said corporation was organized or that its organization was consented to by defendant pursuant to any representations and inducements, or representations or induce-

ments; and in this behalf defendant alleges that said corporation was organized pursuant to the terms of the aforesaid agreement, dated the 20th day of December, 1894, and not otherwise; and defendant alleges that upon the organization of said Beaver Hill Coal Company the entire capital stock thereof was issued and held by defendant in accordance with the terms of said agreement dated the 20th day of December, 1894, and not otherwise; and denies that 2500 shares of said Beaver Hill Coal Company were the property of plaintiff, and alleges that the only interest which plaintiff had in any of said stock was the interest specified and set forth in said agreement dated the 20th day of December, 1894, which said agreement is hereby referred to for a more particular definition of the rights of plaintiff and this defendant in reference thereto; further answering unto said Paragraph IV this defendant denies that plaintiff and said Beaver Hill Coal Company entered into an agreement on the 21st day of February, 1896, or at any other time or at all, wherein and whereby it was agreed that the plaintiff should receive the sum of \$150 per month, or any other sum, as his salary and compensation, or salary or compensation as manager of said Beaver Hill Coal Company; but defendant admits in this behalf that defendant did agree to pay to plaintiff \$150 per month, and also a sufficient sum to pay the premiums on two policies of life insurance for \$50,000 each, provided that plaintiff would assign one of said policies to defendant as further security for moneys then due from plaintiff to defendant, but it is denied that the agreement to pay the

premiums on said policies of insurance was intended to be, or was agreed to be, part of the salary of plaintiff as manager of said Beaver Hill Coal Company, and defendant alleges that all agreements and negotiations with reference to the respective rights of plaintiff and defendant in and to said Policy No. 664673 were adjudicated and settled by the terms of that certain agreement dated June 8, 1899, a copy of which constitutes "Exhibit A," attached to plaintiff's complaint; answering further unto that portion of said Paragraph IV of plaintiff's complaint with reference to the "Klondyke Mine" and "Klondyke Spur Railroad," this defendant avers that it is without knowledge as to whether said Klondyke Spur Railroad was built out of plaintiff's own funds, and as his individual property, but this defendant denies that said Klondyke Spur Railroad was constructed or built by plaintiff in reliance upon any promises and inducements, or promises or inducements of this defendant; and further with reference to plaintiff's allegation that he furnished and supplied the rolling stock for said Klondyke Spur Railroad, consisting of locomotives and freight cars, this defendant avers that it is without knowledge as to those matters.

V.

Answering unto Paragraph V of plaintiff's complaint, this defendant admits that on the 1st day of November, 1897, there became due and owing by plaintiff to this defendant, and was unpaid the sum of \$523,-162.52, and that on said last named date defendant demanded of plaintiff that he execute and deliver to de-

fendant his promissory note for said last named sum, and that he deliver to defendant as security by way of pledge for the payment of said note the property referred to in said complaint, and in this answer, but this defendant denies that it assured plaintiff that upon the execution of said promissory note and the delivery of said security, or upon the execution of said promissory note or the delivery of said security, plaintiff would be aided by defendant in carrying on said Beaver Hill Coal Company mine, and would not be disturbed in the management thereof, and would likewise not be disturbed in the management or control of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and would not be interfered with or disturbed as to his interests in said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, or in any other respect; and likewise denies that defendant assured plaintiff that upon the execution of said promissory note, and the delivery of said security, or upon the execution of said promissory note, or the delivery of said security, that plaintiff would be aided by defendant in carrying on said Beaver Hill Coal Company mine, or would not be disturbed in the management thereof, or would likewise not be disturbed in the management or control of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, or would not be interfered with or disturbed as to his interests in said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, or in any other respect; this defendant denies that plaintiff protested to defendant that the payment of interest monthly was a great burden upon plaintiff and one

which it would be difficult for him to bear, and defendant denies that any representations or promises in connection with the payment of said promissory note and the interest due or to grow due thereon, were made by defendant; and denies that defendant stated anything about not embarrassing plaintiff, or anything about assisting or aiding plaintiff; and denies that defendant stated to plaintiff that no advantage would be taken of any failure to pay interest on said note short of the maturity thereof; defendant admits that as security for the payment of the said promissory note and interest to grow due thereon, plaintiff delivered to this defendant 10,001 shares of the capital stock of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and 620 bonds of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, each of the face value of \$1,000, and also a deed to certain real property situated in the Town of Marshfield, County of Coos, State of Oregon, but defendant denies that the value of said real estate was the sum of \$250,000, and alleges in this behalf that said real property was not worth in excess of the sum of approximately \$20,000; and in this behalf defendant alleges that said shares of stock and said bonds and said deed were prior to the execution and delivery to it by plaintiff of said promissory note on the 1st day of November, 1897, already held by defendant as collateral and security for the payment of said indebtedness amounting to the sum of \$523,162.52, which prior to the execution and delivery of said promissory note was an indebtedness on open account; that said indebtedness due

on said open account became thereafter merged in said promissory note and the same security held by defendant to secure the payment of said open indebtedness continued to be held by defendant as security for the payment of said promissory note; defendant denies that at the time of the execution of said promissory note defendant agreed that it would require no further or other security from plaintiff; and denies that it did agree to transfer and deliver, or transfer or deliver to plaintiff the aforesaid policy of insurance No. 664,673; defendant admits that it did continue to hold said policy of insurance and did not deliver the same to plaintiff, but defendant alleges that it rightfully so continued to hold said policy of insurance, and did rightfully refuse and neglect to deliver the same to plaintiff.

VI.

Answering unto Paragraph VI of said complaint, this defendant denies that plaintiff used his utmost efforts to develop said properties and to make them paying investments, or to develop said properties or to make them paying investments; and likewise denies that plaintiff devoted his utmost energies through said years in an effort to make said corporation paying investments for defendant; and in this behalf defendant admits that plaintiff did during said period devote a portion of his time and energies for the purposes aforesaid, but alleges in this behalf that the energies and time devoted by plaintiff in connection with said Coos Bay, Roseburg & Eastern Railroad & Navigation Company were entirely for the benefit of plaintiff and not

at all for the benefit of or in the interests of defendant, and as to the time and energies devoted by plaintiff to said Beaver Hill Coal Company, that such time and energies so devoted by plaintiff were equally for the benefit of plaintiff and defendant; and defendant denies that it was understood and agreed, or understood or agreed, throughout said times, or at any time or at all, by this defendant and the plaintiff that the plaintiff should continue indefinitely and without interruption, or indefinitely or without interruption, as the manager of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and of said Beaver Hill Coal Company, or of either of them, and likewise denies that it was understood and agreed, or understood or agreed, that plaintiff should be given every opportunity, or any opportunity, to establish the same on a paying basis, and in this behalf defendant alleges that plaintiff was the sole owner of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and that defendant had no understandings or agreements with him in regard to the management of said railroad or in regard to any of the other matters alleged in said Paragraph VI in that behalf; and defendant denies that it was recognized by defendant that said railroad had been built through the efforts and energies of plaintiff, and in this behalf defendant alleges that there was no recognition, understanding or agreement with reference to the question as to whose efforts and energies were involved in the building of said railroad, and defendant denies that defendant recognized that the properties of said Beaver Hill Coal Company had been discovered

and made known, or been discovered or made known, to defendant by plaintiff; and in this behalf defendant alleges that there was no recognition, understanding or agreement with reference to the question as to whose efforts and energies were involved as to the discovery and making known to defendant of the properties of said Beaver Hill Coal Company; and this defendant denies that throughout said entire period and down to November 1, 1897, or during any period whatsoever, or at all, except in accordance with the terms of said agreement, a copy of which is set forth in Paragraph II of plaintiff's complaint, defendant assured plaintiff that he would receive full and adequate, or full or adequate, or any financial or other assistance and support, or assistance or support, of this defendant; defendant denies that at the time of the execution of said promissory note it was understood and agreed, or understood or agreed, by and between plaintiff and defendant that plaintiff was thereby, that is to say, by the execution of said promissory note, conveying ample or any security to defendant to secure all, or any, of plaintiff's indebtedness to defendant; and defendant likewise denies that it was specifically or otherwise, agreed and understood, or agreed or understood, between plaintiff and defendant at the time of the execution of said note, and as part of the consideration therefor, or at the time of the execution of said note or as part of the consideration therefor, that plaintiff should not be embarrassed or disturbed in the management of said Beaver Hill Coal Company, or in any of his alleged interests in said railroad.

VII.

Answering unto Paragraph VII of plaintiff's complaint, defendant denies that at the time of the execution of said promissory note, or at any time or at all, defendant was unknown to plaintiff, or in any other manner or at all, planning and devising, or planning or devising means to secure exclusive, or any possession and control, or possession or control, of all or any of the stock of said Beaver Hill Coal Company, and of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, or of either of them, to the end that this defendant might thereafter operate as its exclusive property both, or either of the said companies, and their respective plants, or their respective plants, or for any other purpose or at all, or to the end that defendant might be in a position to sell or dispose of the same at an enormous or any profit without being required to divide said profits with plaintiff, or for any other purpose or at all, and defendant denies that at the time of the execution of said promissory note, and for some time prior thereto, or at the time of the execution of said promissory note, or for some time prior thereto, or at any time or at all, this defendant had been planning and devising, or had been planning or devising, means to bring about the financial or any ruin of plaintiff, so that plaintiff might be unable to redeem any of said stocks and bonds or other securities, or stocks or bonds or other securities, or for any other purpose or at all; and this defendant denies that, for the purpose of carrying out said alleged plan by defendant, or for any purpose or at all, immediately after securing

from plaintiff the aforesaid promissory note, or at any time or at all, this defendant well knowing, or knowing at all, that plaintiff was financially or otherwise embarrassed, and would be unable to pay said note or the interest thereon, or embarrassed or would be unable to pay said note or the interest thereon if disturbed as manager of said Beaver Hill Coal Company, or with the purpose of accomplishing the financial ruin of plaintiff, or for the purpose of securing possession of all or any of plaintiff's property, or for the purpose in part of securing possession and control, or possession or control, of the capital stock and bonds, or capital stock or bonds, of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, or of the stock of said Beaver Hill Coal Company, or for any other purpose or at all, did demand of plaintiff that he forthwith or at all resign as the manager of said Beaver Hill Coal Company; in this behalf, however, defendant admits that shortly after the execution of said promissory note defendant did demand that plaintiff resign as manager of said Beaver Hill Coal Company for the reason that plaintiff was incompetent and untrustworthy in the matter of the management of said Beaver Hill Coal Company, and because of the incompetency and untrustworthiness of plaintiff as manager of said Beaver Hill Coal Company defendant did discharge plaintiff as such manager, and did revoke the power and authority of plaintiff as such manager, which had theretofore been conferred on plaintiff to act for said Beaver Hill Coal Company in said State of Oregon; and defendant denies that it did thereby or at all,

revoke the salary of plaintiff, for the reason that defendant had never agreed or promised to pay to plaintiff any salary; in this behalf defendant admits that it did place said Chandler in charge of said properties, who thereafter had the management thereof; that said Chandler did close down said mining property for a short time for the purpose of rehabilitating the same and conserving it after the incompetent and ruinous management of plaintiff; that said Beaver Hill Coal Company's properties were at all times continued in operation to the extent that it was possible to operate them, and that defendant at no time deprived said Coos Bay, Roseburg & Eastern Railroad & Navigation Company of any freight earnings from said coal properties which it was possible to furnish to said railroad; and denies in this behalf that said Coos Bay, Roseburg & Eastern Railroad & Navigation Company was deprived of freight earnings from said coal amounting to the sum of \$100 per day; and in this behalf defendant alleges that said Coos Bay, Roseburg & Eastern Railroad & Navigation Company was not deprived of any earnings whatsoever by this defendant to the amount of \$100 or any sum whatsoever per day; this defendant admits that the earnings from shipments of coal had at all times been a large part and portion of the freight shipped over the line of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, but defendant denies that it well knew, or knew at all, at said time, or any time, that it was necessary that coal shipments should be sent over said railroad in order to insure an income from the operation of said rail-

road, and in this behalf defendant alleges that there was never any understanding or agreement between plaintiff and this defendant, or between said Beaver Hill Coal Company and said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, that any particular or definite amount of coal should be furnished by said Beaver Hill Coal Company to said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and defendant alleges in this behalf that it was solely a matter for said Beaver Hill Coal Company to decide how much coal should be mined by said Beaver Hill Coal Company, and how much should be furnished to said Coos Bay, Roseburg & Eastern Railroad & Navigation Company; and defendant denies that it was understood and agreed, or understood or agreed, between plaintiff and said defendant that said, or any, shipments of coal should continue over said railroad in order that said railroad should have a steady source of income, or in order that plaintiff should be able to derive an income therefrom, and should thereby be enabled to pay to this defendant the money due to defendant by plaintiff; and in this behalf defendant alleges that there was never any understanding and agreement between plaintiff and defendant concerning any of the matters alleged in said Paragraph VII of the complaint, except as expressly admitted herein; replying unto the allegations in said Paragraph VII to the effect that said alleged acts of said Beaver Hill Coal Company deprived plaintiff of his entire income of every kind and character, this defendant alleges that defendant is without knowledge of whether plaintiff

had other sources of income; and defendant in answer to the averment that without the alleged salary which plaintiff alleges he was entitled to receive as manager of said Beaver Hill Coal Company, and the earnings of said Railroad Company, he was unable to pay the interest on said promissory note, this defendant alleges that it is without knowledge thereof; and defendant denies that it purposely caused the removal without cause of plaintiff as manager of said Beaver Hill Coal Company; and denies that it caused the shutting down of said Beaver Hill Coal Company mines to the extent that the operation thereof was suspended for the purpose of accomplishing the financial ruining of plaintiff, or of securing to defendant, pursuant to any plan, the exclusive or any control of said railroad and coal company, or either of them, or of the real property at Marshfield, or of said insurance policies for \$50,000, or of all or any of the other properties conveyed as security for the payment of said note; and defendant likewise denies that immediately after the removal of plaintiff as manager of said Beaver Hill Coal Company, or at any time, or with the purpose of further, or at all, financially or otherwise embarrassing the plaintiff, or for the purpose of insuring his financial or other ruin, or in order that plaintiff might not be able to redeem any of said properties, or in order that this defendant might secure the ownership and control, or ownership or control, of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and said Beaver Hill Coal Company, or either of them, it did cause said Beaver Hill Coal Company to commence an action in

the Superior Court of the City and County of San Francisco against the plaintiff for an accounting, and for judgment for a large, or any, sum of money, or that the defendant did bring said action against the Coos Bay, Roseburg & Eastern Railroad & Navigation Company in the District Court of the United States, for the District of Oregon, for the purpose of having a receiver appointed for said railroad, or for the purpose of preventing plaintiff from having any further control or management thereof, or with a view to further embarrassing the plaintiff financially or otherwise, or to prevent him from earning money with which to redeem the stocks and bonds, or stocks or bonds, of said railroad company, or the stock of said coal company theretofore pledged to defendant by plaintiff; but it did cause said Beaver Hill Coal Company to commence an action in the Superior Court of the City and County of San Francisco against the plaintiff for an accounting and for judgment for a large sum of money, and that defendant did bring action against said Coos Bay, Roseburg & Eastern Railroad & Navigation Company in the District Court of the United States, for the District of Oregon, for the purpose of having a receiver appointed for the said railroad, and to prevent plaintiff from having any further control or management thereof, but defendant alleges that both and each of said suits were brought in good faith by defendant for the purpose of enforcing the legal rights and privileges which defendant enjoyed and that said actions, and each of them, were necessary in order to protect defendant and the interests of defendant from

the incompetency and mismanagement of plaintiff, and of threatened attacks upon the rights of this defendant by plaintiff; defendant admits that plaintiff did not pay the interest on said promissory note from and after the 1st day of April, 1898, but is without knowledge as to why plaintiff did not pay such interest; and defendant denies that the inability of plaintiff to pay said interest was caused, or was intended to be caused, by any act or desire of this defendant; defendant admits that on or about the 13th day of June, 1898, defendant did commence an action in the Superior Court of the City and County of San Francisco, State of California, against plaintiff, to recover from plaintiff, and the defendant in said action, the principal sum named in said promissory note, together with interest thereon from the 1st day of April, 1908, and for the purpose of having the properties deposited with defendant to secure the payment of said promissory note sold, and to have the proceeds arising from the sale of said properties applied to the payment of said promissory note, and for the purpose of having plaintiff barred of all right to redeem the same; but defendant alleges in this behalf that the commencement of said suit was not for the purpose, as alleged by plaintiff, of completing, or causing the financial or any ruin of plaintiff, or for the purpose of insuring to defendant the complete and absolute, or complete or absolute, or any control of all or any of the stocks, bonds or other properties transferred as security for the payment of said promissory note, but that said suit was commenced and prosecuted for the sole purpose of enforcing the payment of said

promissory note; defendant denies that for the purpose of securing possession and control, or possession or control, of Beaver Hill Coal Company, or for the purpose of more completely, or otherwise, or at all, insuring the financial, or other ruin of plaintiff, or for the purpose of preventing plaintiff from securing possession of stocks and bonds, or stocks or bonds, of said railroad and coal companies, or either of them, did cause its secretary, without authority and in violation of law, or without authority or in violation of law, to sign the name of plaintiff to the certificates of stock owned by plaintiff in Beaver Hill Coal Company, which said stock was then in the possession of this defendant, and in this behalf defendant alleges that the name of plaintiff signed on said certificates of stock was signed by plaintiff himself, and was not signed or caused to be signed by defendant, or by any person connected with defendant.

VIII.

Answering unto Paragraph VIII of plaintiff's complaint, in regard to plaintiff's allegations that plaintiff was brought to the brink of financial ruin, defendant is without knowledge in reference thereto, but alleges in this behalf that no act of defendant did cause plaintiff to be financially embarrassed or be deprived of all income and means of making payments, or all income or means of making payments, or did cause plaintiff to be deprived of any of his property, or did cause plaintiff to be involved in litigation; defendant admits that on or about the 10th day of April, 1899, this de-

defendant did bring on for trial the said action by defendant against plaintiff, pending in the Superior Court of the City and County of San Francisco, but defendant is without knowledge as to the allegation that plaintiff was at that time financially embarrassed and involved in the greatest financial distress, and was pressed by various actions caused to be instituted by this defendant; this defendant admits that the agreement dated June 8, 1899, a copy of which (containing many errors therein), marked "Exhibit A," is attached to plaintiff's complaint, was entered into between plaintiff and defendant, but defendant denies that at the time of the entering into the agreement plaintiff was harassed, annoyed and persecuted, or harassed, annoyed or persecuted, by defendant, either because of the actions which were then pending against him, or from any other cause for which defendant was responsible; defendant admits that said agreement was entered into by plaintiff and this defendant for the purpose of enabling plaintiff if possible to pay to defendant the money then admittedly due, owing and unpaid by plaintiff to defendant, and also additional moneys for the purpose of enabling plaintiff to purchase from defendant not only the properties theretofore held by this defendant as security for the payment of said promissory note (and of the judgment of said Superior Court of the City and County of San Francisco in which said promissory note had become merged) and the other properties mentioned in said agreement, and for the purpose of giving to plaintiff the first option of securing the ownership, possession and control of

all the properties mentioned in said agreement, but if plaintiff for any reason was unable or unwilling to exercise said first option then for the purpose of assuring to defendant the right not only of having its right and ownership confirmed in said 20,000 shares of the capital stock and of said 620 first mortgage bonds of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, but also of all the other properties mentioned in said agreement, whether owned by plaintiff or this defendant, and for the purpose of terminating after the 8th day of December, 1899, all business relations between plaintiff and this defendant arising out of the transactions set forth in plaintiff's complaint, and arising out of all other business transactions in connection with the properties mentioned in said agreement, and for the purpose of settling, compromising and adjusting all matters of dispute and controversy then existing between plaintiff and this defendant; defendant denies that plaintiff was advised by his counsel that in making said agreement a failure on plaintiff's part to comply with the provision requiring payment of the sum of \$550,000 mentioned in said agreement, would not forfeit plaintiff's title to the bonds, stocks, securities and deeds of other properties mentioned in said agreement, but that said properties conveyed to defendant as security would merely be held as continuing security, and that defendant would not under any state of facts claim under any breach of said agreement to be the owner of any of said property or securities, and defendant denies that plaintiff verily or at all believed such alleged advice at the time of signing

said agreement, and at all or any times thereafter, and in this behalf defendant is informed and believes, and on such information and belief alleges, that plaintiff was advised by his counsel that if plaintiff did fail to pay said sum of \$550,000 in accordance with the terms of said agreement, that plaintiff would forfeit his title and all his right, title and interest in and to the properties mentioned in said agreement, and that plaintiff did verily believe the advice of his attorney in that behalf given him at the time of the execution of said agreement; replying to the further allegations in said Paragraph VIII of the complaint to the effect that plaintiff was by defendant compelled in connection with the execution of said agreement, dated June 8, 1899, to include within the terms of said instrument as further security, the properties mentioned in the remaining portion of said Paragraph VIII, defendant denies the allegations with reference thereto, except in so far as the same are consistent with the terms and conditions set forth in said agreement, dated June 8, 1899, and defendant alleges that all the negotiations, promises and conditions understood and agreed upon by plaintiff and defendant prior to and at the time of the execution of said agreement, dated June 8, 1899, were merged in and became incorporated in said agreement dated June 8, 1899, and in this behalf defendant alleges that all promises, conditions and covenants in said agreement contained were made voluntarily by plaintiff of his own free will, and were not caused by the duress, fraud, representations or acts of defendant.

IX.

Answering unto Paragraph IX of plaintiff's complaint, defendant denies that by any act of this defendant he was financially or otherwise crippled or deprived of his income, or was without the power to dispose of his property, and denies that plaintiff was oppressed and harassed and distracted by the exactions of this defendant, or was oppressed or harassed or distracted by the exactions of this defendant, and denies that this defendant well knowing or knowing at all any of the facts to be true which plaintiff in said Paragraph IX complains of purposely and designedly, or purposefully or designedly, or with an intent to secure plaintiff's property, threatened that it would drive plaintiff into bankruptcy and financial ruin, or into bankruptcy or financial ruin, unless plaintiff included in said agreement all the properties set forth therein; and in this behalf defendant alleges that each and all of the terms of said agreement, dated June 8, 1899, were incorporated by the mutual desire and understanding of both plaintiff and defendant, and that plaintiff had adequate and competent legal advice as to his rights in the premises, and was advised at every step of the proceedings of his rights, and that said agreement was entered into both by plaintiff and defendant in perfect good faith, and that each of the parties thereto was acting entirely on his own responsibility and for the purpose of safeguarding his own individual interests.

X.

Answering unto that portion of plaintiff's complaint beginning with the words "Within the six months' period provided for payment in said agreement of June 8th, 1899" to and including the words "prior to the commencement of this action" (said allegations constituting Paragraph X of plaintiff's complaint, if properly numbered) defendant denies that within the six months' period provided for payment in said agreement of June 8, 1899, or at any time or at all, plaintiff secured an agreement with defendant, Southern Pacific Company, either through Collis P. Huntington, its President, or George Crocker, its Vice-President, by which said Southern Pacific Company was to pay and advance, or pay or advance, the sum of \$550,000, provided for in said agreement, for the purpose of enabling plaintiff to secure possession of all of his property mentioned in said agreement, or for any other purpose or at all, or for the purpose of enabling said Southern Pacific Company to purchase from plaintiff the interest in and ownership, or interest in or ownership of plaintiff in said Coos Bay, Roseburg & Eastern Railroad & Navigation Company; and defendant denies that said defendant Southern Pacific Company did agree to pay a sum greatly in excess of \$550,000, or did agree to pay plaintiff any sum whatsoever for said property, and defendant denies that it wrongfully or with intent or purpose of preventing plaintiff from paying said sum mentioned in, or for the purpose of preventing plaintiff from securing possession of his properties described in said agreement of June 8, 1899, or for any other pur-

pose or at all, or in order to enable defendant to secure possession of all or any of the properties of plaintiff set forth in said agreement, or to enable defendant thereafter to sell said properties to Southern Pacific Company for a greater sum for the benefit of this defendant, did persuade defendant Southern Pacific Company and said Collis P. Huntington and said George Crocker, or either or any of them, not to pay said sum or any sum of money, as alleged to have been agreed by said Southern Pacific Company with plaintiff; and denies that this defendant did fraudulently and wrongfully, or fraudulently or wrongfully, or at all, represent and state, or represent or state, to Southern Pacific Company and said Collis P. Huntington and said George Crocker, or to either or any of them, that all or any of plaintiff's interest and property, or interest or property were hopelessly or at all involved in entangled litigation, or otherwise, or that by paying said sum of \$550,000, Southern Pacific Company would be merely purchasing a series of complex law suits, or that plaintiff could not convey or cause to be conveyed any right to either the stock or bonds of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, or any other properties mentioned in said agreement of June 8, 1899; and defendant denies that it did fraudulently and wrongfully, or fraudulently or wrongfully, represent and assure or represent or assure to Southern Pacific Company, and its officers, or to either or any of them, that if said Southern Pacific Company would withhold the alleged payment as alleged to have been agreed and promised by Southern Pacific Company

to plaintiff, or would refuse to make any payments to plaintiff in order to enable plaintiff to carry out his part of said agreement of June 8, 1899, that this defendant would thereby secure control and possession, or control or possession, of all or any of the properties of said plaintiff set forth in said agreement of June 8, 1899, or of the stocks or bonds of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, or that upon the expiration of the six months' period mentioned in said agreement this defendant would sell the said property to said Southern Pacific Company at a sum agreeable both to defendant and to said Southern Pacific Company, but that if defendant Southern Pacific Company, or its aforesaid officers, should pay said sum of \$550,000 to plaintiff, defendant would complicate and entangle, or complicate or entangle, said properties, or any of them, in long and expensive, or long or expensive litigation, and in this behalf defendant alleges that all of the allegations of plaintiff to the effect that he had negotiations with defendant Southern Pacific Company for the purchase of said property are hereby denied, and all allegations of plaintiff to the effect that this defendant conspired against plaintiff and for the purpose of inducing said Southern Pacific Company to refrain from purchasing said properties from plaintiff are hereby denied; and this defendant denies that because of any fraudulent and wrongful, or fraudulent or wrongful representations or statements, or threats of this defendant that said Southern Pacific Company, and its officers, or any of them, were deterred and prevented, or deterred or prevented, from making

the said payment of \$550,000 as alleged to have been agreed with plaintiff; as to the allegation of plaintiff that he was prevented from paying said sum of \$550,000 because defendant Southern Pacific Company did not advance to plaintiff said sum of \$550,000, this defendant is without knowledge, but alleges in this behalf that plaintiff at no time had any agreement or understanding with said Southern Pacific Company whereby said Southern Pacific Company had agreed to purchase said properties, or to advance to plaintiff any sum of money whatsoever; this defendant denies that said agreement of June 8, 1899 ("Exhibit A" attached to said complaint) was never consummated or completed in accordance with the terms of said agreement, and never became effective between the parties, and in this behalf this defendant alleges that said agreement did become consummated and completed in accordance with the terms thereof, and did become effective between the parties at the expiration of the six months' period provided for in said agreement, to-wit, on or about the 8th day of December, 1899; and this defendant denies that the said agreement dated June 8, 1899, was not consummated or completed, or never became effective for any of the reasons set forth in subdivisions (a), (b), (c), (d), (e), (f) and (g), set forth and specified in said Paragraph X of said complaint; and answering more specifically unto said subdivisions (a), (b), (c), (d), (e), (f) and (g), this defendant, answering unto said subdivision (a) denies that there was never delivered, or that there was not delivered to plaintiff a release executed by Beaver Hill Coal Com-

pany releasing and discharging, or releasing or discharging, plaintiff from claims and demands, or claims or demands held against plaintiff by said Beaver Hill Coal Company as provided in Paragraph 2 of said agreement, dated June 8, 1899, and in this behalf this defendant alleges that said release executed by Beaver Hill Coal Company was delivered to plaintiff upon the signing of said agreement, and in accordance with the terms thereof; this defendant, answering unto said subdivision (b), says that it is without knowledge in reference thereto; this defendant answering unto said subdivision (c) alleges that the shares of stock of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company referred to in subdivision (a) of Paragraph 6 of said agreement, were not transferred or issued to said William L. Pierce, J. W. Bennett, Frederick S. Samuels, W. S. Chandler, S. W. Hazard, R. A. Graham or Thomas R. Sheridan, or to either or any of them, for the reason that plaintiff refused and declined to call a meeting of the directors of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company then in office for the purpose of effecting and consummating such transfer and issue of said stock; this defendant, answering unto said subdivision (d) alleges that plaintiff prevented a meeting of the directors then in office of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company to be called for the reorganization of the Board of Directors of said company; that the directors then in office were and each of them was under the direction and control of plaintiff, and said directors and each of them, were instructed and directed by plain-

tiff, as this defendant is informed and believes, not to hold or attend any meeting of the directors of said company; this defendant, answering unto said subdivision (c) alleges that no resignation of directors was filed, or delivered to the trustee, for the reason that none of the directors whose resignations were contemplated to be handed to said trustee were ever elected, for the reasons assigned in the answer of this defendant to said subdivisions (c) and (d) hereinabove; this defendant, answering unto said subdivision (f) alleges that for the reasons already alleged in answer to to subdivisions (c), (d) and (e) hereinabove, this defendant was unable to procure a meeting of the Board of Directors of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company for the purpose of executing and delivering, or executing or delivering, to plaintiff a release and discharge, or release or discharge, of the claims and demands, or claims or demands, which said Coos Bay, Roseburg & Eastern Railroad & Navigation Company had against plaintiff, and in this behalf this defendant alleges that plaintiff prevented defendant from causing a meeting of said Board of Directors of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company to be held, and did prevent the execution and delivery to plaintiff of said release and discharge; this defendant, answering unto said subdivision (g), denies that there was not delivered to plaintiff the satisfaction of judgment provided by subdivision (f) of Paragraph 10 of said agreement, and in this behalf this defendant alleges that there was delivered to plaintiff said satisfaction of judgment; and further answer-

ing unto said Paragraph X of plaintiff's complaint, defendant admits that the Bank of California, the trustee named in said agreement, dated June 8, 1899, did at the end of the six months' period named in said agreement, delivered to this defendant the stocks and bonds, and other property named in said agreement, which according to the terms of said agreement were to be delivered to this defendant, but this defendant denies that the delivery of said property to this defendant by the said Bank of California was in violation of said agreement of June 8, 1899, or contrary to the protest of this plaintiff, but this defendant alleges in that behalf that the delivery of said property to this defendant by said Bank of California was in fulfillment and in accordance with the terms of said agreement; and further answering unto said Paragraph X of plaintiff's complaint, this defendant admits that on or about the 15th day of December, 1899, defendant did take possession of the properties belonging to said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, but denies that said possession was taken by force of arms, and fraudulently and wrongfully, or fraudulently or wrongfully, and likewise denies that this defendant did hold a fraudulent and purported, or fraudulent or purported, election of directors of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, or that said election was without a quorum of stockholders or legally elected directors present, or of stockholders or of legally elected directors present; this defendant admits that it caused the stock formerly standing in the name of the plaintiff to be transferred to the name of

this defendant, but denies that any of said acts were done wrongfully or fraudulently, or in violation of the rights of plaintiff, but on the other hand defendant alleges that all of said acts were done in performance of and according to the terms of said agreement dated June 8, 1899; and this defendant denies that it did thereupon convert, or did convert at all, to its own use the stocks and bonds, or stocks or bonds, of this defendant; and denies that it did convert to its own use, or did convert at all at any time, said 20,000 shares of the capital stock of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, or any shares at all of the capital stock of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company; and does likewise deny that it did convert to its own use, or did convert at all, or at any time, said 620 or any bonds of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company; this defendant admits that it did on or about the 2nd day of July, 1906, sell said 20,000 shares of the capital stock and said 620 bonds of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company to Southern Pacific Company; this defendant, however, denies that said sale was for \$1,200,000, and in this behalf this defendant alleges that the total sale price of said 20,000 shares of capital stock, and said 620 bonds, and of various other properties belonging to this defendant, was the sum of \$1,300,000; this defendant denies that the reasonable value of said shares of stock was \$30.00 per share, and in this behalf alleges that said stock was of no value at all per share, and that said Southern Pacific Company paid to this defendant no

value at all for said shares of stock; and this defendant further denies that said bonds were of the value of \$1,000, or that the total value of said bonds was the sum of \$620,000, but on the contrary this defendant alleges that said bonds were of no greater value than \$720 per bond, and denies that defendant Southern Pacific Company paid to this defendant any greater sum for said bonds than at the rate of approximately \$720 per bond; and this defendant denies that defendant Southern Pacific Company had full knowledge, or any knowledge and notice, or knowledge or notice, of plaintiff's ownership of said stocks and bonds, or stocks or bonds, or of plaintiff's alleged rights and interests, or rights or interests therein; and denies that defendant Southern Pacific Company took possession and purchased, or took possession or purchased, said stocks and bonds, or stocks or bonds, with full or any notice of the alleged rights of plaintiff thereto; this defendant admits that defendant Southern Pacific Company has continued to hold and retain the use and control of said stocks and bonds, but this defendant alleges that such use and control has been at all times under claim of ownership and right to retain said use and control by said Southern Pacific Company; this defendant denies that plaintiff has made repeated or any demands upon it to deliver said stocks and bonds, or either of them, to plaintiff; this defendant admits that it has at all times since on or about the 8th day of December, 1899, claimed the full title and ownership to said stocks and bonds.

XI.

Answering unto Paragraph XI of plaintiff's complaint, defendant admits that there has been no accounting between plaintiff and defendant since the making of said promissory note, other than the accounting and settlement and satisfaction of all claims and demands as provided for by the terms of said agreement, dated June 8, 1899; defendant denies that plaintiff has at any time asked or demanded of defendant an accounting relating to any of the transactions alleged in plaintiff's complaint, and defendant denies that defendant has received of defendant Southern Pacific Company, or from any other person, \$625,000 or any other sum due by plaintiff to defendant, and in this behalf defendant alleges that there are no moneys due from plaintiff to defendant, and there have been no moneys due from plaintiff to defendant since the 8th day of June, 1899.

XII.

Answering unto Paragraph XII of plaintiff's complaint and unto the allegations of plaintiff that he is now ready, willing and able to pay to defendant any sum which may be adjudged and declared by this court to be due from plaintiff to defendant, this defendant is without knowledge in reference thereto; and as to the allegation that plaintiff is ready, willing and able to pay to defendant any sum which may be adjudged and declared by this court to be due from plaintiff to defendant, this defendant is without knowledge in reference thereto; and as to the allegation that plaintiff is ready,

willing and able to redeem said stocks and bonds described in said complaint, and alleged to have been converted by defendants, this defendant alleges that it is without knowledge in reference thereto.

XIII.

Answering unto Paragraph XIII of plaintiff's complaint, this defendant denies that plaintiff has not been guilty of laches in the prosecution of this action, and in this behalf defendant alleges that plaintiff has been guilty of laches both in the commencement and prosecution of this action; defendant alleges that delays in the commencement and in the prosecution of said action have not been caused by circumstances over which plaintiff has had no control, but have been caused by plaintiff himself, and by acts for which plaintiff himself is responsible.

As a first further answer and defense to plaintiff's complaint, this defendant alleges that on or about the 3rd day of September, 1892, plaintiff and this defendant entered into an agreement in writing, a copy of which is set forth in Paragraph II of plaintiff's complaint, which said copy of said agreement is correct save for the errors noted in Paragraph II of this defendant's answer hereinabove; that pursuant to said last named agreement plaintiff herein delivered to this defendant a certificate of stock of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company for 10,001 shares of the capital stock of said corporation, which was the property of plaintiff herein, and that there was also issued and delivered to this defendant from

time to time all of the first mortgage bonds of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company save and except five of said bonds previously sold by plaintiff to other persons, and that under said agreement this defendant received in all 620 of such first mortgage bonds of the par value of \$1,000 each, and this defendant furnished to plaintiff the money to construct the railroad from Marshfield to Myrtle Point in said State of Oregon; that thereafter and in or about the month of April, 1898, plaintiff was indebted to this defendant in the sum of \$523,162.52 on account of advances made by this defendant to plaintiff for the construction of said railroad with interest thereon, and to secure the payment of such advances plaintiff had theretofore pledged unto this defendant said 10,601 shares of the capital stock of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and said 620 first mortgage bonds; thereupon said indebtedness being overdue and plaintiff having failed to pay or discharge the same, this defendant commenced a suit in the Superior Court of said City and County of San Francisco, State of California, against plaintiff herein, and plaintiff was served with process in said suit and answered the complaint therein, and said suit was thereafter called for trial and the trial of said suit was begun; that thereafter and before the termination of the trial of said action, said agreement dated June 8, 1899, (a copy of which, marked "Exhibit A" is attached to plaintiff's complaint herein), was made and entered into between plaintiff and this defendant; that theretofore and on June 7, 1898, plaintiff had commenced a suit in the

Circuit Court of the State of Oregon, for the County of Coos, against the Beaver Hill Coal Company, a corporation, and A. B. Spreckels, John D. Spreckels, F. S. Samuels and C. A. Hug as defendants, for the appointment of a receiver to take charge of the property of said Beaver Hill Coal Company, which said suit was afterwards duly removed, and at the time of said agreement dated June 8, 1899, was pending in the Circuit Court of the United States, for the District of Oregon, and which said suit is referred to in the first paragraph of said agreement dated June 8, 1899; that pursuant to said agreement dated June 8, 1899, said receivership suit so brought by plaintiff was dismissed and the said suit brought by Beaver Hill Coal Company against plaintiff herein in the Superior Court of the City and County of San Francisco, mentioned in said agreement of June 8, 1899, was dismissed, and said Beaver Hill Coal Company duly executed and delivered to plaintiff its release, releasing and discharging plaintiff herein from all claims and demands by it against plaintiff herein; that on or about the 8th day of January, 1899, this defendant commenced in the Circuit Court of the United States, for the District of Oregon, a suit against the Coos Bay, Roseburg & Eastern Railroad & Navigation Company and R. A. Graham, J. B. Hassett and T. R. Sheridan, which said suit was pending on June 8, 1899, and that pursuant to said agreement dated June 8, 1899, the said receivership suit brought by this defendant was dismissed on June 16, 1899; that on June 12, 1899, pursuant to said agreement of June 8, 1899, a decree was duly entered in the case of J. D. Spreckels

& Bros. Company, plaintiff, vs. R. A. Graham, defendant, in the Superior Court of the City and County of San Francisco, State of California, for the sum of \$523,162.52, with interest thereon from April 1, 1898, which said decree provided for an order of sale of the securities theretofore pledged to this defendant, who was the plaintiff in said suit, and proceedings to enforce said decree were stayed pursuant to said agreement dated June 8, 1899, for the period of six months; that on or about the 9th day of June, 1899, this defendant did deliver to the Bank of California, the Trustee named in said agreement dated June 8, 1899, the following:

(a) Certificate for 10,001 shares of the capital stock of Coos Bay, Roseburg & Eastern Railroad & Navigation Company, theretofore pledged to this defendant by plaintiff, which said certificate was duly endorsed by this defendant;

(b) 620 of the first mortgage bonds of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, being all of the bonds theretofore pledged by plaintiff herein to this defendant;

(c) Assignments in proper form to said Trustee of all judgments of record rendered in the courts of Coos County, Oregon, in favor of this defendant, and then held by it as collateral security for the payments of money owing to this defendant by plaintiff;

(d) All of the shares of the capital stock of Beaver Hill Coal Company excepting one share thereof issued to each of the then directors of said company, and all

of said shares of stock so issued to the directors were also by them endorsed and delivered to said trustee;

(e) Satisfaction in proper form and duly acknowledged of said judgment rendered in the Superior Court of the City and County of San Francisco, State of California, in favor of this defendant and against the plaintiff herein, for the sum of \$523,162.52, with interest;

(f) An agreement executed by A. B. Spreckels giving the plaintiff an option to purchase the interest of said A. B. Spreckels in certain real property in Coos County, State of Oregon, known as the "Chadwick Tract";

(g) A deed to certain real property in the Town of Marshfield, County of Coos, State of Oregon, executed by this defendant and plaintiff;

That plaintiff, pursuant to the terms and conditions of said agreement, dated June 8, 1899, delivered to said Trustee, the Bank of California, the following:

(a) All the shares of the capital stock of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company in excess of 10,001 shares, which certificates were properly endorsed by plaintiff herein;

(b) The resignations of all of the directors of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company then in office, the same to take effect upon the election of the directors named in said agreement dated June 8, 1899;

(c) A release executed by plaintiff discharging the Beaver Hill Coal Company from any and all claims and demands which plaintiff herein might have against said company, said release not to take effect, however, except upon the failure of plaintiff to pay, or cause to be paid, to said Bank of California for the use and benefit of this defendant, the sum of \$550,000, as provided in said agreement dated June 8, 1899;

(d) A release executed by plaintiff releasing and discharging the Coos Bay, Roseburg & Eastern Railroad & Navigation Company from any and all claims and demands which the plaintiff herein might have, or claim to have, against said company;

That plaintiff wholly failed to pay, or cause to be paid, to said Bank of California, or to any one else for the benefit of this defendant, within six months from the date of said agreement, dated June 8, 1899, or within any time or at all, the said sum of \$550,000, or any part thereof, as provided by the terms of said agreement; that under the terms of said agreement the title to all the shares of stock of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and to the bonds of said last named company, and to the real property and judgments assigned to or held by, or standing in the name of said Trustee, at the expiration of said six months from the date of said agreement, to-wit, on December 8, 1899, vested in and became the property of this defendant; that thereby and by the terms of said agreement plaintiff released and discharged said Coos Bay, Roseburg & Eastern Railroad & Navigation Com-

pany from any and all claims which he at that time or theretofore had or might have on account of salary, wages or otherwise, and then and there and thereby released any and all claims that he then or theretofore or at any time had in or to any of said stocks or bonds, or any of the property of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and then and there and thereby released and discharged this defendant from any and all claims which he then or there or at any time theretofore, may have had against this defendant, and that on or about the 15th day of December, 1899, pursuant to the terms of said agreement, dated June 8, 1899, and at the request of this defendant, and with the knowledge and consent of plaintiff herein, the said Bank of California, as such Trustee, delivered to this defendant all of the capital stock of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, properly endorsed by the record holders of said stock, and the 620 first mortgage bonds of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and the said release and other documents required to be delivered by the terms of said agreement; that pursuant to the terms of said agreement plaintiff having failed and neglected to pay said sum of \$550,000 or any part thereof, said Trustee delivered to plaintiff, and plaintiff accepted and received the satisfaction of judgment entered in said suit mentioned in Paragraph 4 of said agreement dated June 8, 1899, to-wit, the satisfaction of the judgment and decree rendered in the Superior Court of the City and County of San Francisco in favor of this defendant against plaintiff for the

sum of \$523,162.52, with interest thereon at 6% per annum from the 1st day of April, 1899, and said plaintiff then and there accepted said release and satisfaction in full performance of the terms and conditions of said agreement to be kept and performed by this defendant; that by the terms of said agreement dated June 8, 1899, all matters in controversy between plaintiff and this defendant, and between plaintiff and said Coos Bay, Roseburg & Eastern Railroad & Navigation Company and between plaintiff and said Beaver Hill Coal Company, were settled and adjudged by said agreement, and upon the performance and execution of the terms of said agreement, said agreement operated as a satisfaction of all claims and demands, and of all matters in controversy between plaintiff and this defendant; that thereafter in violation of said agreement dated June 8, 1899, plaintiff refused to permit a meeting of the directors of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, or to cause a meeting to be called as required by Paragraph 7 of said agreement, for the reorganization of the Board of Directors of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, or to permit the persons named in said paragraph to be elected to serve as directors during the life of said agreement, and until their successors should be elected and qualified, or otherwise to comply with the terms of said Paragraph 7 of said agreement, and thereby prevented this defendant from procuring a further release to be executed by said Coos Bay, Roseburg & Eastern Railroad & Navigation Company releasing and discharging plaintiff from any and all claims which said

company might have against said plaintiff, but in this behalf this defendant alleges that said agreement dated June 8, 1899, was self-executing in this respect, and of its own weight operated to release and discharge plaintiff from all claims and demands which said Coos Bay, Roseburg & Eastern Railroad & Navigation Company then had or might have had against plaintiff; that thereafter and on the 8th day of January, 1900, this defendant duly commenced in the Circuit Court of the United States, for the District of Oregon, a suit in equity against said Coos Bay, Roseburg & Eastern Railroad & Navigation Company and T. R. Sheridan, J. W. Bennett, R. A. Graham, F. N. McLean, O. J. Seeley, J. B. Hassett and W. H. Trelease, praying the court for a decree that said Coos Bay, Roseburg & Eastern Railroad & Navigation Company through its proper officers should issue and deliver to this defendant, and to such persons as this defendant should designate, certificates of stock of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company then owned and held by this defendant, to-wit, 20,000 shares of the capital stock of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and that said Coos Bay, Roseburg & Eastern Railroad & Navigation Company through its proper officers should register this defendant, and such persons as it might designate, as the stockholders of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and that upon a full hearing a referee should be appointed to conduct a proper election of a board of directors of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and an

organization of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company in accordance with the rights of the stockholders thereof so to be registered, and that judgment be entered in favor of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company and against said R. A. Graham for such funds as might by said court be found to have been improperly diverted by said R. A. Graham from the property and assets of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and that pending the termination of said suit and until the further order of said court a receiver should be appointed to take charge of, manage, control and operate the property and assets of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company;

That in the complaint filed in said action this defendant as complainant therein, alleged that it was then (on the 8th day of January, 1900) the owner of said 20,000 shares of the capital stock of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and was then also the owner of said 620 of the first mortgage bonds of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company; that thereafter a subpoena ad respondendum was duly served upon each of the defendants in said suit, including said defendant R. A. Graham in said suit; that thereafter and on the 15th day of March, 1900, the said R. A. Graham duly filed a demurrer in said action to said bill of complaint, and thereafter such proceedings were had in said suit so that on April 3, 1900, the demurrer of said R. A. Graham was overruled and thereafter and on the 6th day of

August, 1900, said R. A. Graham did file his answer to the complaint filed by this defendant in said action, which said answer was verified by said R. A. Graham in person, and whereby and wherein said R. A. Graham as defendant in said action admitted that this defendant as complainant in said action was the owner of said 20,000 shares of the capital stock of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, but denied that this defendant was the owner of said 620 or any number of the first mortgage bonds of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company; that thereafter and while said cause was pending, and on the 8th day of February, 1905, said R. A. Graham as defendant in said case, and this defendant acting by their solicitors in said action made and entered into a stipulation in writing, and caused the same to be filed in said court in said cause in words and figures following, to-wit:

*“In the Circuit Court of the United States for the
District of Oregon.*

J. D. Spreckels & Bros. Company, a corporation organized and existing under the laws of the State of California, and a citizen and inhabitant thereof,

Complainant,

vs.

Coos Bay, Roseburg & Eastern Railroad & Navigation Company, a corporation organized and existing under the laws of the State of Oregon, and a citizen and inhabi-

tant thereof, and T. R. Sheridan, J. W. Bennett, R. A. Graham, F. H. McLean, O. J. Seeley, J. B. Hassett, and W. H. Trelease, citizens of the State of Oregon, and inhabitants thereof,

Defendants.

“It is hereby stipulated, considered and agreed that the answer heretofore filed herein by the defendant Robert A. Graham be withdrawn and that the complainant may have judgment as prayed for in the complaint, except the relief prayed for in the third division of the prayer of said complaint, to the effect that judgment be entered in favor of the defendant Coos Bay, Roseburg & Eastern Railroad & Navigation Company, against the defendant Robert A. Graham for funds alleged to have been improperly diverted by the said Graham from the said railroad, and that such judgment be entered without costs as against the defendant Robert A. Graham, and without further notice.

Dated New York, Feb. 8, 1905.

R. A. GRAHAM,
Defendant.

WILLIAMS, WOOD & LINTHICUM,
Solicitors for Complainant.

State of New York,
County of New York,—ss.

On this 8th day of February, 1905, before me personally came Robert A. Graham, to be known and

known to me to be the person described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

SARAH E. SINNIGAR,

Notary Public Kings County, Certificate filed
in New York County.”

That said stipulation was duly filed in said court and said cause by the parties thereto on July 19, 1907; that thereafter and while said suit was pending upon said complaint and answer and replication duly filed in said cause, the Farmers' Loan & Trust Company, as complainant, duly commenced a suit on April 17, 1900, in the Circuit Court of the United States for the District of Oregon, against the Coos Bay, Roseburg & Eastern Railroad & Navigation Company and others, to foreclose the first mortgage executed by the said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and for the appointment of a receiver in said cause; and that on May 1, 1900, said court in said cause duly appointed W. S. Chandler as such receiver, and thereupon and on said date W. S. Chandler duly qualified as such receiver, and took into his possession as such receiver in said foreclosure suit, all the property and assets of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, which he had theretofore had in his possession as receiver in said suit so brought by said J. D. Spreckels & Bros. Company against the Coos Bay, Roseburg & Eastern Railroad & Navigation Company hereinbefore set out; that while said property was so in the possession of said receiver, and the said Circuit

Court of the United States was so in charge of the said property of the Said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and while said suit so brought by the said J. D. Spreckels & Bros. Company against the Coos Bay, Roseburg & Eastern Railroad & Navigation Company and others, including the plaintiff Graham, as above set forth, was pending and undetermined, the said stipulation of date February 8, 1905, was entered into and filed in said cause, and then and thereby all matters and things in dispute between the said J. D. Spreckels & Bros. Company and the said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and the said R. A. Graham, as to the meaning and effect and as to the terms of the said agreement of June 8, 1899, were settled and compromised, and the said R. A. Graham then and thereby accepted the disclaimer and release of the said Coos Bay, Roseburg & Eastern Railroad & Navigation Company of its claim against him for an accounting, or for any sum, and then and there and thereby waived any claim of any kind which the said R. A. Graham may have had that the said J. D. Spreckels & Bros. Company had not complied with all the terms and provisions of the agreement of June 8, 1899, and had not procured a release to be executed by the said Coos Bay, Roseburg & Eastern Railroad & Navigation Company releasing him, the said R. A. Graham, from any claims that it might then or at any time have against him; and that thereafter, relying upon said stipulation and agreement so made between the said parties in said cause, and so filed in said cause, the Circuit Court of the United States, on July 19, 1907,

entered its decree in words and figures as follows, to-wit, omitting title and caption of said cause therefrom:

“At this time complainant, by Williams, Wood & Linthicum, its solicitors, moving in open court that the bill of complaint filed in this cause be dismissed without prejudice, and it appearing that the demurrers of the defendants T. R. Sheridan, J. W. Bennett, F. H. McLean, O. J. Seeley, J. B. Hassett, and W. H. Trelease, filed by said respective defendants to the bill of complaint, have heretofore been sustained by this court, and that said bill of complaint has not been amended as to said respective defendants:

And it furthermore appearing that by written stipulation of the respective parties filed herein, the answer of the defendant, R. A. Graham, has been withdrawn, and the defendant, Coos Bay, Roseburg & Eastern Railroad & Navigation Company, having by its counsel in open court consented to the dismissal of said bill of complaint:

And it furthermore appearing that by order of this court made in that certain suit filed by the Farmers' Loan & Trust Company, as complainant, against the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, et al., as defendants, W. S. Chandler, originally appointed as the receiver of the property of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, was in said other suit made receiver of the property and assets of the Coos Bay, Roseburg & Eastern Railroad &

Navigation Company, and the receivership in this proceeding terminated:

And it further appearing that in said other suit J. D. Spreckels & Bros. Company as sole creditor of said receiver, and Southern Pacific Company, owner of all of the capital stock and all of the bonds of said railroad company, have severally consented in writing to the dismissal of said other suit, and that the accounts of said receiver should be deemed and considered as closed;

It is therefore considered, ordered and adjudged that the bill of complaint filed in this cause be and the same is hereby dismissed without prejudice, and W. S. Chandler, originally appointed as receiver of the property and assets of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, is hereby discharged from further duties as such receiver, and the bond of said receiver is hereby cancelled, and his sureties on such bonds exonerated and said receiver is hereby directed to turn over unto the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, all property of said corporation which has come into and now is in the possession of such receiver.

Dated July 19, 1907.

(Signed) CHAS. E. WOLVERTON,
Judge."

That the said Coos Bay, Roseburg & Eastern Railroad & Navigation Company then and thereby waived any and all claims of any kind which it then or at any time had against said R. A. Graham and that the said company has never at any time asserted or made any claim against said R. A. Graham, and that any and all claims which it might have had, were fully released and settled under and pursuant to said agreement of June 8, 1899, and under and pursuant to said agreement and stipulation so made in said cause between plaintiff and the said J. D. Spreckels & Bros. Company on February 8, 1905, and by reason of said decree of said court entered in said cause pursuant to said stipulation, all matters in controversy between the plaintiff and the said Coos Bay, Roseburg & Eastern Railroad & Navigation Company and the said J. D. Spreckels & Bros. Company were fully and finally settled, released and discharged, and by reason of the premises, all claims of every kind, of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company against said R. A. Graham, have long since been, prior to the commencement of this action, fully barred under the statute of limitations of the State of Oregon, and that by reason of the premises any and all disputes as to the meaning and effect and performance by either party of the said agreement of June 8, 1899, has become settled, satisfied and all liabilities between the parties released and discharged; that by reason of all the matters and things hereinbefore stated, the plaintiff is and of right ought to be estopped to prosecute this action or claim that the said release executed by him was not effective from and after December 15,

1899, and to claim that the said stock and bonds, and the whole thereof, did not belong to J. D. Spreckels & Bros. Company from and after December 15, 1899; that this defendant has duly kept and performed all the terms and conditions of said agreement, dated June 8, 1899, required by said agreement to be kept and performed by it, the said defendant.

As a second further answer and defense to plaintiff's complaint, this defendant alleges that plaintiff has been guilty of laches in both the commencement and prosecution of this action; in this behalf this defendant alleges that it did from on or about the 8th day of December, 1899, to on or about the 2nd day of July, 1906, (being the date of the sale of said stocks and bonds to defendant Southern Pacific Company) have the actual, open, notorious and exclusive use and possession of said stocks and bonds, and of each and all of them, and did so use and hold in its possession said stocks and bonds openly, notoriously, continuously and adversely and under a claim of right and ownership which was hostile to the claim and right and possession of plaintiff, ever since on or about said 8th day of December, 1899, to on or about said 2nd day of July, 1906; that during all of said time plaintiff had knowledge that this defendant had the aforesaid actual, open, notorious and exclusive possession and use of said stocks and bonds under such claim of right, and was in possession and control and in the enjoyment of all the properties belonging to said Coos Bay, Roseburg & Eastern Railroad & Navigation Company either through the agents and employees of this defendant, or through the receiver appointed at the request of this

defendant, in the action entitled "The Farmers' Loan & Trust Company, Plaintiff, vs. Coos Bay, Roseburg & Eastern Railroad & Navigation Company, et al., Defendants," and which said last-named suit is known and designated as No. 2616 upon the files of the above-entitled court; that notwithstanding that this defendant during all of said times held and enjoyed such use and possession of said stocks and bonds, and under a claim of ownership and title thereto adverse to all claims of plaintiff therein, and notwithstanding plaintiff, during all of said times, had full knowledge that defendant held and enjoyed such possession and use of said stocks and bonds under such claim of right, yet nevertheless plaintiff did sleep upon his alleged rights and did utterly fail and neglect to bring any action at law or equity in order to enforce his alleged rights in said stocks and bonds until the 7th day of December, 1907, when this plaintiff did commence an action in the Circuit Court of the State of Oregon, in and for the County of Coos, entitled "R. A. Graham, plaintiff, vs. J. D. Spreckels & Bros. Company, a corporation, and Southern Pacific Company, a corporation, defendants," which said action was thereafter, on motion of this defendant, transferred to the United States District Court in and for the District of Oregon, and which said suit is still pending therein; that plaintiff thereafter did not bring said last named action on to trial, but on or about the 17th day of January, 1916, did file in said last named action in the above entitled court an amendment of his complaint wherein said last named action was changed from an action at law to a suit in equity, and wherein a wholly different

cause of action is set forth from that contained in plaintiff's original complaint; that defendant has been greatly and seriously prejudiced and injured by plaintiff's delay and laches both in the commencement of said last named action on the 7th day of December, 1907, and by his failure to prosecute the same with diligence, and by his filing said amendment to said complaint wherein the whole theory and scope of plaintiff's action has been changed and altered; and in this behalf defendant alleges that its two most important witnesses upon the issues embraced within this action are dead; that one person who would be a witness for defendant is named E. F. Preston, who was an attorney at law in San Francisco, California, and who was the attorney in chief representing this defendant in connection with the drawing up and execution of said agreement dated June 8, 1899; that said Preston was the chief person representing this defendant who had talks and conversations with plaintiff, or with plaintiff's attorneys, directly as to the meaning and intent of the parties in connection with the drawing up and execution of said agreement; that said Preston did discuss all matters with this defendant before the signing and execution of said agreement, and this defendant well knows the instructions given to said Preston by this defendant as to the kind and sort of agreement which should be drawn up and executed between it and this plaintiff, but the actual oral conversations and negotiations had in behalf of this defendant with plaintiff were had and conducted by said Preston; that said E. F. Preston died on or about the 16th day of April, 1905; that another person who would be a

witness for this defendant, one S. P. Smith, formerly an officer of said Bank of California, is dead, he having died on or about the 16th day of August, 1907; that said Smith is the person who did deliver to plaintiff the satisfaction of judgment referred to by plaintiff in subdivision (g) of Paragraph X of his complaint, and would, if alive, be able to testify in behalf of this defendant to the effect that said satisfaction of judgment was delivered by said Smith to plaintiff; that C. A. Hug is another person who would be a witness for defendant; said Hug died on or about the 21st day of May, 1909; that said Hug, during all the times mentioned in plaintiff's complaint, and up to the date of his death, was secretary of this defendant, and was familiar with the contents of various letters and other documents pertaining to the issues of this action, all of which said letters and documents were destroyed in the great earthquake and conflagration of April 18, 1906, in the City and County of San Francisco, State of California, the place where the principal place of business of this defendant is and was during all the times mentioned in plaintiff's complaint. In this behalf defendant further alleges that the office and principal place of business of this defendant is, and during all the times mentioned in plaintiff's complaint was, in the City and County of San Francisco, State of California; that in said office was kept all of the correspondence passing between plaintiff and this defendant relating to the issues of this action, and to the matters and things of which plaintiff complains in his complaint, and relating to the matters of defendant's defense herein. There were also kept in

said office various documents and papers containing evidence of various kinds relevant, competent and material to the issues of this action; that all of said letters, papers and documents (with the exception of a very few which were of a more formal character and which were for that reason kept in a safe deposit vault), were destroyed in the great earthquake and conflagration which occurred April 18, 1906, in said City and County of San Francisco; that this defendant has no copies and is not able to procure copies of any of said letters, papers and documents so lost; that its secretary during all of said times was said C. A. Hug, who had the custody of said letters, papers and documents, and who was familiar with the contents thereof; that in said earthquake and conflagration were also lost all the papers, memoranda and documents of said E. F. Preston which related to the signing and execution of said agreement dated June 8, 1899; that all, or practically all, of the papers and documents on the files of the County Clerk of the Superior Court of the City and County of San Francisco, State of California, were likewise destroyed in said earthquake and conflagration, amongst which were all the papers and records and transcripts of testimony in the suit commenced by this defendant against this plaintiff in said Superior Court of the City and County of San Francisco, for the enforcement of the payment of said promissory note referred to by plaintiff in Paragraph V of his complaint, and also all the records, papers, documents and transcripts of testimony in that certain other action commenced in said Superior Court of the City and County of San Francisco by Beaver Hill Coal Com-

pany against said plaintiff Graham; that in the records, papers, processes and files of said actions, and in each of them, was much evidence pertinent, material and competent to the issues in this case, and to the defense of defendant herein; that the issues involved in said two cases wherein the records are lost embrace substantially the controversies and disagreements then existing between plaintiff and this defendant, which gave rise to and formed the consideration for said agreement dated June 8, 1899; that in the first of said suits, wherein suit was brought on said promissory note, plaintiff gave much testimony and evidence which was reduced to writing by the court reporter in said action, but said testimony has likewise been lost and destroyed; that likewise in said action of Beaver Hill Coal Company vs. Graham, much testimony and evidence of plaintiff was taken in said case and reduced to writing by the court reporter therein, but said testimony and evidence was likewise destroyed in said earthquake and conflagration of April 18, 1906.

As a third further answer and defense to plaintiff's complaint, this defendant alleges that said agreement dated June 8, 1899, (a copy of which, marked "Exhibit A" is attached to plaintiff's complaint) and the performance thereof was and operated as an accord and satisfaction of all matters and things in dispute and controversy between plaintiff and this defendant.

As a fourth further answer and defense to said action, this defendant alleges that defendant duly performed all the conditions of said agreement, dated June

8, 1899, on his part to be performed, and that said agreement dated June 8, 1899, and the performance thereof by this defendant, operated as a release, discharge and extinguishment of all claims and demands by plaintiff in connection with the subject matter embraced within the scope of plaintiff's complaint herein.

As a fifth further answer and defense to said action, this defendant alleges that said agreement dated June 8, 1899, was and operated as a novation between plaintiff and defendant, and that the former agreement and obligation existing between plaintiff and defendant in and to the capital stock and bonds of Coos Bay, Roseburg & Eastern Railroad & Navigation Company, or in or to the capital stock and bonds of Coos Bay, Roseburg & Eastern Railroad & Navigation Company, were extinguished by said agreement dated June 8, 1899, and said agreement dated June 8, 1899, was substituted as a new obligation between plaintiff and defendant, and defined anew the rights and liabilities of plaintiff and defendant concerning their respective rights in and to said capital stock and bonds of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company.

As a sixth further answer and defense to said action, defendant alleges that on or about the 8th day of June, 1899, defendant did make, execute and deliver to this defendant its release in writing by the terms of which for valuable consideration plaintiff did release and discharge this defendant from any and all claims and demands which plaintiff then had or claimed to have, against this defendant, on account of any and all mat-

ters and things whatsoever from the beginning of the world to on or about said 8th day of June, 1899.

As a seventh further answer and defense to said action, this defendant alleges that on or about the 8th day of June, 1899, plaintiff did make, execute and deliver to this defendant his release in writing by the terms of which said release plaintiff did release and discharge this defendant from any and all claims and demands whatsoever against this defendant, whether in favor of said Beaver Hill Coal Company or in favor of plaintiff individually, by reason of or on account of this defendant being or having been a stockholder or director in said Beaver Hill Coal Company, or in said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, or by reason of this defendant being or having been a pledgee of the capital stock of said Beaver Hill Coal Company and said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, or of either of them.

As an eighth further answer and defense to said action, this defendant alleges that on or about the 8th day of June, 1899, plaintiff did make, execute and deliver to defendant an instrument in writing whereby plaintiff did for good consideration and in consideration of the settlement of all matters in dispute between plaintiff and defendant, consent that said Coos Bay, Roseburg & Eastern Railroad & Navigation Company might execute an instrument releasing and discharging this defendant from all claims and demands of every kind and nature whatsoever against it by said Coos Bay, Roseburg & Eastern Railroad & Navigation Company,

and that when so executed plaintiff would be, and would consent to be, bound by the same as though his signature was appended thereto; that thereafter said Coos Bay, Roseburg & Eastern Railroad & Navigation Company did release this defendant from all claims and demands of every kind and nature whatsoever, and plaintiff thereby did become bound by said release to the same extent as if his signature was appended thereto.

As a ninth further answer and defense to said action, this defendant alleges that for a period of more than six years prior to the commencement of this action, defendant was in the actual, notorious, open, exclusive, peaceable and lawful possession of all of the capital stock and mortgage bonds of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company mentioned and described in plaintiff's complaint herein, and under a claim of right and title to all of said shares of stock and to said 620 first mortgage bonds of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company; that on the 2nd day of July, 1906, (the date when this defendant did sell said capital stock and mortgage bonds of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company to defendant Southern Pacific Company), this defendant was the true and lawful owner of all of said capital stock, and of each and all of said 620 mortgage bonds of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and that at said time this plaintiff was without any right, title or interest in and to said capital stock, or any part thereof, or in and to said 620 first mortgage bonds, or any of them.

As a tenth further answer and defense to said action, this defendant alleges that on or about the 8th day of January, 1900, while this defendant was in the actual, lawful, exclusive and peaceable possession of all of said 20,000 shares of stock, and all of said 620 first mortgage bonds of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, this defendant did assert its sole ownership thereto and thereof, and to the whole of said 20,000 shares of the capital stock and of said 620 first mortgage bonds of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and did assert and claim that plaintiff herein had no right, title or interest whatsoever in or to said 20,000 shares of the capital stock, or any part thereof, or in or to said 620 first mortgage bonds, or any thereof, of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and this defendant did on or about the 11th day of January, 1900, notify and did bring notice home to this plaintiff of such claim of ownership by this defendant in and to the whole of said 20,000 shares of the capital stock, and in and to the whole of said 620 first mortgage bonds of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and this plaintiff did on or about said 11th day of January, 1900, have full knowledge of the claim of sole ownership by this defendant of said 20,000 shares of the capital stock and of said 620 of the first mortgage bonds of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company; yet, nevertheless, said plaintiff did wholly fail and neglect for a period of more than six years thereafter to take any action at law or otherwise, either for the recovery of said 20,000 shares

of the capital stock, or any part thereof, or of said 620, or any of said first mortgage bonds of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and did wholly fail and neglect to assert any right, title, claim or interest against defendant in or to any portion of said 20,000 shares of the capital stock, or in or to any portion of said 620 first mortgage bonds of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company; that during all of the period of time from on or about the 8th day of December, 1899, to on or about said 2nd day of July, 1906, said capital stock and said mortgage bonds of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company were of very little value, and were worth far less than the amount of the indebtedness which was then due, owing and unpaid by plaintiff to this defendant, and which said amount it would in any event have been necessary for plaintiff to have paid this defendant in order to redeem from defendant, in any event, any portion of said 20,000 shares of capital stock, or any portion of said 620 first mortgage bonds of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company; in this behalf defendant expressly denies that plaintiff at any time during said period of time had any right to redeem from defendant any portion of said capital stock, or of said mortgage bonds of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company; that it was only after plaintiff learned of the sale of said capital stock and said mortgage bonds to defendant Southern Pacific Company on or about said 2nd day of July, 1906, that plaintiff made any claim to any right, title or interest in and

to any portion of said 20,000 shares of the capital stock, or to any portion of said 620 first mortgage bonds of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company.

As an eleventh further answer and defense to said action, defendant alleges that said action is barred by subdivision 1 of Section 337 of the Code of Civil Procedure of the State of California; that said action is barred by subdivision 3 of Section 338 of the Code of Civil Procedure of the State of California; that said action is barred by subdivision 4 of Section 338 of the Code of Civil Procedure of the State of California; that said action is barred by subdivision 1 of Section 339 of the Code of Civil Procedure of the State of California; that said action is barred by Section 343 of the Code of Civil Procedure of the State of California.

As a twelfth further answer and defense to said action, defendant alleges that said action is barred by Section 26 of Bellinger & Cotton's Annotated Codes and Statutes of the State of Oregon; that said action is barred by the provisions of subdivision 4 of Section 6 of Bellinger & Cotton's Annotated Codes and Statutes of the State of Oregon; that said action is barred by subdivision 4 of Section 6 of Lord's Oregon Laws; that said action is barred by the provision of subdivision 2 of Section 5 of Lord's Oregon Laws; that said action is barred by the provisions of subdivision 1 of Section 6 of Lord's Oregon Laws; that said action is barred by Section 11 of Lord's Oregon Laws; that said action is barred by subdivision 1 of Section 8 of Lord's Oregon

Laws; that said action is barred by Section 26 of Lord's Oregon Laws; that plaintiff's cause of action arose in the State of California; that plaintiff and defendant at the time said cause of action arose were non-residents of the State of Oregon; that at the time of the commencement of plaintiff's action herein plaintiff's cause of action, if any, was barred under the laws of the State of California, and more particularly was barred by the provisions of the Code of Civil Procedure of the State of California, mentioned in the eleventh further answer and defense hereinabove; that after the delivery to this defendant by the Bank of California of said stock and said bonds, and about the 20th day of December, 1899, defendant, as such stockholder, took possession of the railroad of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and on or about the 8th day of January, 1900 brought suit in the Circuit Court of the United States for the District of Oregon, against the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, R. A. Graham, and others, for the registration of such stock and for the election of a new Board of Directors of said corporation, the then directors having ceased to be stockholders, and also having ceased to be directors; and in said suit, upon motion of this defendant, W. S. Chandler was duly appointed Receiver of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and about the 1st day of April, 1900, the Farmers' Loan & Trust Company, as trustee under the mortgage upon said railroad, at the request of this defendant, as the owner of the majority of said bonds, brought suit in said

Circuit Court of the United States for the District of Oregon, against said Coos Bay, Roseburg & Eastern Railroad & Navigation Company and others for the foreclosure of said mortgage and the sale of said road thereunder, and the said W. S. Chandler was also appointed receiver of said railroad in said suit and so continued in the possession of said railroad as such receiver in said respective suits until on or about July 20, 1907, when, upon motion of said defendant, said suits were dismissed; that during the time said W. S. Chandler continued in the possession of said road as such receiver, this defendant, relying upon said agreement of June 8, 1899, and upon the delivery of the said stock and bonds to this defendant, and the action of the plaintiff herein in the execution and performance of said agreement, and relying upon his disclaimer of all his right, title and interest, claim or demand, in or to the said capital stock and said bonds, made and filed in said causes by plaintiff, and relying upon the said settlement so made pursuant to said agreement of June 8, 1899, advanced to the said receiver the sum of \$203,029.09, which money was by said receiver expended in additions to and betterments upon said railroad property by way of filling, bridges, laying new steel, repairing roadbed, laying new ties, reconstructing bridges, purchase of new equipment, and other expenditures necessary and proper for the operation of a railway as a going concern; and that so relying upon said agreement of June 8, 1899, and the failure of the defendant to exercise his option on December 15, 1899, for the re-purchase of said stock and bonds, and re-

lying upon his disclaimer of all right, title or interest in or to the same, this defendant abandoned its claim against said Coos Bay, Roseburg & Eastern Railroad & Navigation Company for said advances, and the defendant alleges that but for said agreement of June 8, 1899, and the matters and things contained thereunder, defendant would not have advanced said sums of money and would not have surrendered its claims against said railroad and said receiver for the repayment thereof, and that prior to the institution of this action, plaintiff at no time asserted any interest in said stocks or bonds of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and by reason of the premises plaintiff herein is and by right ought to be estopped from maintaining this action or asserting or claiming that he is the owner, or that at any time after June 8, 1899, he was the owner of said stock and bonds, or any part thereof.

As a thirteenth further answer and defense to said action, this defendant relying upon said agreement of June 8, 1899, and upon the stipulations made and entered into thereafter in the actions brought in said Circuit Court for the District of Oregon, and hereinabove alleged, this defendant surrendered all claim against said Coos Bay, Roseburg & Eastern Railroad & Navigation Company on account of advances of large sums of money made by this defendant, amounting in the aggregate to over \$200,000, and defendant offsets against any demands of plaintiff herein said sum of \$523,162.52, with interest thereon from April 1, 1898, at the rate of 6% per annum, and the further sum of

\$203,029.09, with interest thereon from February 8, 1905, at the rate of 6% per annum.

As a fourteenth further answer and defense to said action, this defendant alleges that the alleged right of plaintiff to redeem said 20,000 shares of capital stock and said 620 first Mortgage bonds of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and all right, title and interest therein or thereto was waived and abandoned by plaintiff, and in this behalf this defendant alleges that on or about the 15th day of December, 1899, plaintiff was in the possession and control, and in the management of the business and of all the property and assets of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, but that in or about said 15th day of December, 1899, this defendant did become possessed of and in the control and management of all of the business and property and assets of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and ever since on or about said 15th day of December, 1899, to on or about said 2nd day of July, 1906, this defendant did remain in the actual, open, notorious, peaceable, continuous and exclusive possession of all of the properties and assets and in the management and control of the business of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, with the full knowledge and consent of this plaintiff; that this defendant, relying on plaintiff's acquiescence and consent to this defendant's so remaining in the possession and control and management of the business and property and assets of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, did advance

and expend large sums of money in the conduct of the business of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and in the maintenance and improvement of the properties of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, said sum so expended being in excess of \$200,000; that said moneys were expended by this defendant in the bona fide belief that under the terms of said agreement dated June 8, 1899, it had become and was the sole owner of said 20,000 shares of the capital stock and said 620 first mortgage bonds of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and that as such this defendant was entitled to have the possession and management and control of the business and property and assets of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company; that this defendant further relied upon the conduct and representations of plaintiff in this behalf that it was so entitled to secure and remain in possession and control and management of the business and property and assets of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company; that the management of the business and property of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company by this defendant during said period of time from, in or about the 15th day of December, 1899, to, on or about said 2nd day of July, 1906, and the expenditure by this defendant of the sum of over \$200,000 resulted in the great enhancement in the value of the properties and assets of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and of said 620 first mortgage bonds of said Coos Bay, Roseburg &

Eastern Railroad & Navigation Company; that if defendant had not bona fide believed that it was the owner of said 20,000 shares of the capital stock and said 620 first mortgage bonds of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and as such was entitled to secure and remain in the possession and management of the business and property and assets of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and if this defendant had not relied upon the acquiescence of plaintiff in permitting this defendant to secure and remain in possession and control of the business and property and assets of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company this defendant would not have expended said moneys or any part thereof, but would have brought some appropriate action at law or otherwise in order to determine whether or not plaintiff had any right, title or interest in and to said 20,000 shares of capital stock, or any part thereof, or in or to said 620 first mortgage bonds, or any of them, of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company; that plaintiff by his said conduct and actions and representations and because of this defendant's reliance thereon, is now estopped from asserting any right, title or interest in and to said 20,000 shares of the capital stock, or any part thereof, or in and to said 620 first mortgage bonds, or any of them, of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and is estopped and barred from bringing the present action against this defendant.

Wherefore, defendant prays to be dismissed hence with its costs of suit.

PETER F. DUNNE,
WM. D. FENTON,
MORRISON, DUNNE & BROBECK,
Attorneys for Defendant,
J. D. Spreckels & Bros. Company.

United States of America,
State of California,
City and County of San Francisco,
Northern District of California.—ss.

FRED S. SAMUELS, being first duly sworn, deposes and says:

That he is an officer, to wit, the Acting Secretary, of defendant J. D. Spreckels & Bros. Company, and has read the foregoing answer to plaintiff's complaint on file herein, and that the same is true of his own knowledge except as to such matters as are alleged on information and belief, and as to those matters he believes it to be true.

FRED'K S. SAMUELS.

Subscribed and sworn to before me this 31st day of March, 1916.

R. B. TREAT,
Notary Public in and for the City and County of San Francisco, State of California.

(Seal)

Receipt of a copy of the within Answer is hereby admitted this 1st day of April, 1916.

JOHN L. McNABB,
MARTIN L. PIPES,
Attorneys for Plaintiff.

Filed April 5, 1916.

G. H. MARSH, Clerk.

And afterwards, to wit, on the 5th day of April, 1916, there was duly filed in said Court and cause, an Answer of the Southern Pacific Company, in words and figures as follows, to wit:

ANSWER OF SOUTHERN PACIFIC COMPANY.

Comes now the defendant Southern Pacific Company, and answering plaintiff's amended complaint, admits, denies and alleges as follows:

I.

This defendant admits the allegations contained in Paragraph I of said amended complaint.

II.

This defendant alleges that it has neither knowledge nor information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph II of said amended complaint, and therefore this defendant denies the same, except only that it specifically admits

that the plaintiff and the defendant J. D. Spreckels & Bros. Company entered into the written agreement pleaded in Paragraph II of said amended complaint, which said agreement is correct, except that the words "conducted by" should be substituted for the words "deducted from," in the last paragraph of said agreement.

III.

This defendant admits the allegations contained in Paragraph III of said amended complaint.

IV.

This defendant alleges that it has neither knowledge nor information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph IV of said amended complaint, and therefore denies said allegations, except only that this defendant specifically admits that there was incorporated a corporation known and designated as Beaver Hill Coal Company, with a capital stock of \$500,000, divided into 5000 shares of \$100.00 each.

V.

This defendant alleges that it has neither knowledge nor information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph V of said amended complaint, except only that this defendant specifically admits that on the first day of November, 1897, there became owing by the plaintiff to the defendant J. D. Spreckels & Bros. Company, the sum of \$523,162.52, and that plaintiff executed and de-

livered to the said defendant J. D. Spreckels & Bros. Company his promissory note in the sum of \$523,162.52, said promissory note being payable one year from November 1, 1897, and bearing interest at the rate of six per cent. per annum payable monthly. And this defendant further admits that as security for the payment of the said promissory note and interest to accrue thereon, plaintiff delivered to the defendant J. D. Spreckels & Bros. Company 10,001 shares of the capital stock of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and 620 bonds of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, each of the face value of \$1000.00, and also a deed to certain real property situate in the Town of Marshfield, County of Coos, State of Oregon.

VI.

This defendant alleges that it has neither knowledge nor information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph VI of said amended complaint, and therefore denies said allegations.

VII.

This defendant alleges that it has neither knowledge nor information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph VII of said amended complaint, and therefore denies said allegation, except that this defendant specifically admits that the defendant J. D. Spreckels & Bros. Company caused Beaver Hill Coal Company to commence

an action in the Superior Court of the City and County of San Francisco, against the plaintiff, for an accounting, and for judgment for a large sum of money; and except further, that this defendant admits that said defendant J. D. Spreckels & Bros. Company brought action against the Coos Bay, Roseburg & Eastern Railroad & Navigation Company in the Circuit Court of the United States, for the District of Oregon, for the purpose of having a Receiver appointed for said railroad; and except further, that this defendant admits that said defendant J. D. Spreckels & Bros. Company commenced an action in the Superior Court of the City and County of San Francisco, State of California, against the plaintiff, to recover from plaintiff (the defendant in said action) the full principal sum of \$523,162.52 named in said promissory note, together with interest thereon from the first day of April, 1898, and for the purpose of having the properties deposited with said defendant to secure the payment of said promissory note, sold, and to have the proceeds arising from the sale of said properties applied to the payment of said promissory note, and for the purpose of barring plaintiff of all right to redeem the same.

VIII.

This defendant alleges that it has neither knowledge nor information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph VIII of said amended complaint, and therefore denies the same, except only that this defendant admits that the defendant J. D. Spreckels & Bros. Company did bring

on for trial on or about the 10th day of April, 1899, said action between it and the plaintiff then pending in the Superior Court of the City and County of San Francisco; and except further, that this defendant admits that the agreement dated June 8, 1899, copy of which, marked Exhibit A, is attached to plaintiff's amended complaint, was entered into between plaintiff and the defendant J. D. Spreckels & Bros. Company. This defendant is informed and believes, and therefore alleges and states that all the negotiations, promises and conditions understood and agreed upon by plaintiff and the defendant J. D. Spreckels & Bros. Company prior to and at the time of the execution of said agreement dated June 8, 1899, were merged in and became incorporated in said agreement, and in this behalf this defendant is informed and believes, and therefore alleges and states, that all promises, conditions and covenants in said agreement contained were made voluntarily by plaintiff, and were not caused by the duress, fraud, representations, or acts of said defendant J. D. Spreckels & Bros. Company.

IX.

This defendant alleges that it has neither knowledge nor information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph IX of said amended complaint, and therefore denies the said allegations.

X.

Answering that part of plaintiff's amended complaint beginning with the words "Within the six months

period," on page 18, to and including the words "prior to the commencement of this action," on page 23 of said amended complaint (which said part of said amended complaint would constitute Paragraph X thereof if properly numbered), this defendant denies that within the six months period provided for payment in said agreement of June 8, 1899, or at any time, or at all, plaintiff secured an agreement with this defendant, either through Collis P. Huntington, its President, or George Crocker, its Vice-President, or otherwise, or at all, by which this defendant was to pay and advance, or pay or advance the sum of \$550,000 provided in said agreement, for the purpose of enabling plaintiff to secure possession of all his property mentioned in said agreement, or for any other purpose, or at all, or for the purpose of enabling this defendant to purchase from plaintiff the interest in and ownership, or interest in or ownership of plaintiff in said Coos Bay, Roseburg & Eastern Railroad & Navigation Company; and this defendant denies that it agreed to pay the plaintiff a sum greatly in excess of \$550,000, or did agree to pay plaintiff any sum whatsoever for said property; and this defendant denies that J. D. Spreckels & Bros. Company wrongfully or with intent or purpose of preventing plaintiff from paying it said sum of \$550,000, or for the purpose of preventing plaintiff from securing possession of his properties described in said agreement of June 8, 1899, or for any other purpose, or at all, or in order to enable said defendant J. D. Spreckels & Bros. Company to secure possession of all or any of the properties of plaintiff set forth in

said agreement, or to enable said defendant thereafter to sell said properties to this defendant, Southern Pacific Company, for a greater sum than said sum of \$550,000, for the benefit of said defendant J. D. Spreckels & Bros. Company, or otherwise, or at all, did persuade this defendant, Southern Pacific Company, and said Collis P. Huntington, and said George Crocker, or either or any of them, not to pay said sum or any sum of money, as alleged to have been agreed to be paid by this defendant, Southern Pacific Company, to plaintiff.

And this defendant denies that said defendant J. D. Spreckels & Bros. Company did fraudulently and wrongfully, or fraudulently or wrongfully, or at all, represent and state, or represent or state to this defendant, Southern Pacific Company, and said Collis P. Huntington and said George Crocker, or to either or any of them, that all or any of plaintiff's interest and property, or interest or property, were hopelessly or at all involved in entangled litigation, or otherwise, or that by paying said sum of \$550,000 Southern Pacific Company would be merely purchasing a series of complex law-suits, or that plaintiff could not convey or cause to be conveyed any right to either the stock or bonds of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, or any other properties mentioned in said agreement of June 8, 1899.

And this defendant denies that said defendant J. D. Spreckels & Bros. Company did fraudulently or wrongfully, or otherwise, or at all, represent and as-

sure, or represent or assure, to Southern Pacific Company and its officers, or to either or any of them, that if this defendant Southern Pacific Company would withhold the alleged payment as alleged to have been agreed and promised by this defendant Southern Pacific Company to plaintiff, or would refuse to make any payments to plaintiff in order to enable plaintiff to carry out his part of said agreement of June 8, 1899, that said defendant J. D. Spreckels & Bros. Company would thereby secure control and possession, or control or possession of all or any of the properties of said plaintiff set forth in said agreement of June 8, 1899, or of the stocks or bonds of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, or that upon the expiration of the six months period mentioned in said agreement, said defendant J. D. Spreckels & Bros. Company would sell the said properties to this defendant Southern Pacific Company at a sum agreeable to both said defendant J. D. Spreckels & Bros. Company and to this defendant Southern Pacific Company, but that if this defendant Southern Pacific Company, or its aforesaid officers, should pay said sum of \$550,000 to plaintiff, said defendant J. D. Spreckels & Bros. Company would complicate and entangle, or complicate or entangle said properties, or any of them, in long and expensive, or long or expensive litigation.

This defendant denies that it or any of its officers or agents agreed with or promised to the plaintiff to advance to him \$550,000, or any other sum for the purchase of the properties mentioned in plaintiff's amended complaint, or for any other purpose, and denies that the

plaintiff negotiated with it, or with any of its officers or agents, looking toward the advancement to him, or the payment to him of said sum of money by it or by them, in that behalf. This defendant further denies that the defendant J. D. Spreckels & Bros. Company made any statements, representations, or inducements to this defendant, or to any of its officers or agents, to cause it to refrain from purchasing the properties of plaintiff, as alleged in Paragraph X of plaintiff's amended complaint, and denies that because of any statements, representations, inducements or threats of said defendant J. D. Spreckels & Bros. Company to it, or to any of its officers or agents, it was deterred and prevented, or deterred or prevented from making said payment of \$550,000 to plaintiff, as alleged to have been agreed with him. And in this behalf this defendant alleges that plaintiff at no time had any agreement or understanding with it, or with any of its officers or agents, whereby it agreed to or contemplated purchasing said properties, or advancing to plaintiff said sum of \$550,000, or any part thereof.

This defendant denies that said agreement of June 8, 1899 (Exhibit A, attached to said amended complaint), was never consummated or completed in accordance with the terms of said agreement, and never became effective between the parties, and in this behalf this defendant is informed and believes, and therefore alleges and states, that said agreement did become consummated and completed in accordance with the terms thereof, and did become effective between the parties at the expiration of the six months period provided for

in said agreement, to-wit, on or about the 8th day of December, 1899, and this defendant denies that the said agreement dated June 8, 1899, was not consummated or completed, or never became effective for any of the reasons set forth in Subdivisions a, b, c, d, e, f and g, set forth and specified in said Paragraph X of said amended complaint. And answering the allegations contained in said Subdivisions a, b, c, d, e, f and g, both inclusive, this defendant is informed and believes, and therefore alleges and states, as follows:

Answering Subdivision a, this defendant denies that there was never delivered, or that there was not delivered to plaintiff the release executed by Beaver Hill Coal Company releasing and discharging, or releasing or discharging plaintiff from claims and demands, or claims or demands held against plaintiff by said Beaver Hill Coal Company as provided in Paragraph 2 of said agreement, dated June 8, 1899, and in this behalf this defendant alleges that said release executed by Beaver Hill Coal Company was delivered to plaintiff upon the signing of said agreement, and in accordance with the terms thereof; this defendant, answering unto said Subdivision b, says that it is without knowledge in reference thereto; this defendant answering unto said Subdivision c, alleges that the shares of stock of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company referred to in Subdivision a, of Paragraph 6 of said agreement, was not transferred or issued to said William L. Pierce, J. W. Bennett, Frederick S. Samuels, W. S. Chandler, S. W. Hazard, R. A. Graham, or Thomas R. Sheridan, or to either of them, or to any

of them, for the reason that plaintiff refused and declined to call a meeting of the directors of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company then in office for the purpose of effecting and consummating such transfer and issue of said stock; this defendant, answering unto said Subdivision d, alleges that plaintiff prevented a meeting of the directors then in office of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company to be called for the reorganization of the Board of Directors of said company; that the directors then in office were and each of them was under the direction and control of plaintiff, and said directors and each of them, were instructed and directed by plaintiff, as this defendant is informed and believes, not to hold or attend any meeting of the directors of said company; this defendant, answering unto said Subdivision e, alleges that no resignation of directors was filed, or delivered to the Trustee, for the reason that none of the directors whose resignations were contemplated to be handed to said Trustee was ever elected, for the reasons assigned in the answer of this defendant to said Subdivisions c and d hereinabove; this defendant, answering unto said Subdivision f, alleges that for the reasons already alleged in answer to Subdivisions c, d and e, hereinabove, the defendant J. D. Spreckels & Bros. Company was unable to procure a meeting of the Board of Directors of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company for the purpose of executing and delivering, or executing or delivering to plaintiff a release and discharge, or release or discharge, of the claims and demands, or

claims or demands, which said Coos Bay, Roseburg & Eastern Railroad & Navigation Company had against plaintiff, and in this behalf this defendant alleges that plaintiff prevented said defendant J. D. Spreckels & Bros. Company from causing a meeting of said Board of Directors of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company to be held, and did prevent the execution and delivery to plaintiff of said release and discharge; this defendant, answering unto said Subdivision g, denies that there was not delivered to plaintiff the satisfaction of judgment provided by Subdivision f, of Paragraph 10 of said agreement, and in this behalf this defendant alleges that there was delivered to plaintiff said satisfaction of judgment; and further answering unto said Paragraph X of plaintiff's amended complaint, defendant admits that the Bank of California, the Trustee named in said agreement dated June 8, 1899, did at the end of the six months period named in said agreement, deliver to the defendant J. D. Spreckels & Bros. Company the stocks and bonds, and other property named in said agreement, which according to the terms of said agreement were to be delivered to it, but this defendant denies that the delivery of said property to said defendant J. D. Spreckels & Bros. Company by the said Bank of California was in violation of said agreement of June 8, 1899, or contrary to the protest of this plaintiff, but this defendant alleges in that behalf that the delivery of said property to the defendant J. D. Spreckels & Bros. Company by said Bank of California was in fulfillment and in accordance with the terms of said agreement; and further an-

swering unto said Paragraph X of plaintiff's amended complaint, this defendant admits that on or about the 15th day of December, 1899, the defendant J. D. Spreckels & Bros. Company did take possession of the properties belonging to said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, but denies that said possession was taken by force of arms, and fraudulently and wrongfully, or fraudulently or wrongfully, and likewise denies that said defendant J. D. Spreckels & Bros. Company did hold a fraudulent and purported, or fraudulent or purported, election of directors of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, or that said election was without a quorum of stockholders or legally elected directors present, or of stockholders or of legally elected directors present; this defendant admits that defendant J. D. Spreckels & Bros. Company caused the stock formerly standing in the name of the plaintiff to be transferred to the name of said defendant J. D. Spreckels & Bros. Company, but denies that any of said acts were done wrongfully or fraudulently, or in violation of the rights of plaintiff, but on the other hand, defendant alleges that all of said acts were done in performance of and according to the terms of said agreement dated June 8, 1899; and this defendant denies that said defendant J. D. Spreckels & Bros. Company did thereupon convert, or did convert at all, to its own use, the stocks and bonds, or stocks or bonds, of plaintiff; this defendant denies that said defendant J. D. Spreckels & Bros. Company did convert to its own use, or did convert at all, at any time, said 20,000 shares of the

capital stock of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, or any shares at all of the capital stock of said company, and does likewise deny that said defendant J. D. Spreckels & Bros. Company did convert to its own use, or did convert at all, or at any time, said 620 or any bonds of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company; this defendant admits that on or about the 2d day of July, 1906, it purchased from the defendant J. D. Spreckels & Bros. Company said 20,000 shares of the capital stock, and said 620 bonds of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company; this defendant denies that said sale was for \$1,200,000, and in this behalf this defendant alleges that it purchased from said defendant J. D. Spreckels & Bros. Company said 20,000 shares of the capital stock of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and said 620 bonds of said company, and various other properties belonging to said defendant J. D. Spreckels & Bros. Company, for a total purchase price of \$1,300,000; this defendant denies that the reasonable value of said shares of stock was \$30.00 per share, and in this behalf alleges that said stock was of no value at all per share, and that it paid said defendant J. D. Spreckels & Bros. Company nothing for said shares of stock; and this defendant further denies that said bonds were of the value of \$1000, or that the total value of said bonds was \$620,000, but on the contrary, this defendant alleges that said bonds were of no greater value than \$720.00 per bond, and denies that it paid to defendant J. D. Spreckels & Bros. Company

any greater sum for said bonds than at the rate of approximately \$720.00 per bond.

This defendant denies that it had full or any knowledge and notice, or knowledge or notice, of plaintiff's alleged ownership of said stocks and bonds, or stocks or bonds, or of plaintiff's alleged rights and interests, or rights or interests, therein, and denies that it took possession and purchased, or took possession or purchased said stocks and bonds, or stocks or bonds, with full or any notice of the alleged rights of plaintiff thereto. This defendant admits that it has continued to hold and retain the use and control of said stocks and bonds, but this defendant alleges that such use and control has been at all times under claim of ownership and right to retain said use and control by it, and this defendant denies that plaintiff has made repeated or any demands upon it to deliver said stocks and bonds, or either of them, to plaintiff. This defendant admits that at all times since on or about the 8th day of December, 1899, the defendant J. D. Spreckels & Bros. Company claimed the full title and ownership to said stocks and bonds, until on or about the 2d day of July, 1906, since which time this defendant has at all times claimed, and now claims, the full title and ownership to said stocks and bonds.

XI.

This defendant alleges that it has neither knowledge nor information sufficient to form a belief as to the truth or falsity of the allegations contained in Par-

agraph XI of plaintiff's amended complaint, and therefore denies said allegations.

XII.

This defendant alleges that it has neither knowledge nor information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph XII of plaintiff's amended complaint, and therefore denies said allegations.

XIII.

This defendant denies that plaintiff has not been guilty of laches in the prosecution of this action, and in this behalf defendant alleges that plaintiff has been guilty of laches both in the commencement and prosecution and of this action; this defendant alleges that delays in the commencement and in the prosecution of said action have not been caused by circumstances over which plaintiff has had no control, but have been caused by plaintiff himself, and by acts for which plaintiff himself is responsible.

XIV.

This defendant admits the allegations contained in Paragraph XIV of said amended complaint.

And for a first further and separate answer and defense to plaintiff's amended complaint, this defendant alleges the following facts, to-wit:

I.

That on or about the 3rd day of September, 1892, the plaintiff made and entered into a contract in writing with the defendant J. D. Spreckels & Bros. Company, a copy of which said contract is set forth in Paragraph II of plaintiff's amended complaint, which said copy of said contract is correct save for the errors noted in Paragraph II of this defendant's answer.

II.

That pursuant to said last mentioned contract, the plaintiff herein delivered to said J. D. Spreckels & Bros. Company a certificate of stock of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company for 10,001 shares of the capital stock of said corporation, which was the property of the plaintiff herein; and that there was also issued and delivered to J. D. Spreckels & Bros. Company, from time to time, all of the first mortgage bonds of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, save and except five of said bonds previously sold by the plaintiff herein to other persons, and that under said agreement J. D. Spreckels & Bros. Company received in all 620 of such first mortgage bonds of the par value of \$1,000, and the said J. D. Spreckels & Bros. Company furnished to the plaintiff the money which constructed said railroad from Marshfield to Myrtle Point, Oregon.

III.

That thereafter and in the month of April, 1898, the plaintiff herein was indebted to J. D. Spreckels & Bros.

Company, aforesaid, in the sum of \$523,162.52, on account of advances made by said J. D. Spreckels & Bros. Company to the plaintiff for the construction of said railroad, with interest thereon, and to secure the payment of such advances the plaintiff had theretofore pledged unto J. D. Spreckels & Bros. Company said 10,001 shares of the capital stock of the railway company, and said 620 first mortgage bonds of the par value of \$1000 each, and that thereupon said indebtedness being overdue, and the plaintiff having failed to pay or discharge the same, J. D. Spreckels & Bros. Company commenced a suit in Department No. 3 of the Superior Court of the City and County of San Francisco, State of California, against the plaintiff herein, and the plaintiff herein was served with process in said suit, and answered the complaint herein, and said suit was thereafter called for trial, and the trial of said suit begun; that thereafter and before the termination of the trial of said action, said agreement dated June 8, 1899 (a copy of which, marked Exhibit A, is attached to plaintiff's amended complaint herein) was made and entered into between plaintiff and the defendant J. D. Spreckels & Bros. Company.

That on June 7, 1898, plaintiff commenced a suit in the Circuit Court of the State of Oregon, for Coos County, against the Beaver Hill Coal Company, a corporation, and A. B. Spreckels, John D. Spreckels, F. S. Samuels, and C. A. Hug, as defendants, for the appointment of a Receiver to take charge of the property of the Beaver Hill Coal Company, which said suit was afterwards duly removed, and at the time of said agreement was pending in the Circuit Court of the United States,

for the District of Oregon, and which said suit is referred to in the first paragraph of said agreement.

That pursuant to said agreement, said receivership suit so brought by the plaintiff herein, and so removed into the Circuit Court of the United States, for the District of Oregon, against the Beaver Hill Coal Company, was dismissed, and the said suit brought by the Beaver Hill Coal Company against the plaintiff herein, in the Superior Court of the City and County of San Francisco, State of California, mentioned in said agreement of June 8, 1899, was dismissed, and said Beaver Hill Coal Company duly executed and delivered to the plaintiff herein its release releasing and discharging plaintiff herein from all claims and demands by it against the plaintiff herein.

That on or about the 8th day of January, 1899, J. D. Spreckels & Bros. Company duly commenced in the Circuit Court of the United States, for the District of Oregon, a suit against the Coos Bay, Roseburg & Eastern Railroad & Navigation Company and R. A. Graham, J. B. Hassett, and T. R. Sheridan, which said suit was pending on June 8, 1899, and that pursuant to said agreement, the said receivership suit so brought by the said J. D. Spreckels & Bros. Company against the Coos Bay, Roseburg & Eastern Railroad & Navigation Company and others, aforesaid, was dismissed on June 16, 1899.

That on June 12, 1899, pursuant to said agreement of June 8, 1899, a decree was duly entered in the case of J. D. Spreckels & Bros. Company, plaintiff, versus

R. A. Graham, defendant, in the Superior Court of the City and County of San Francisco, State of California, for the sum of \$523,162.52, with interest thereon from April 1, 1898, which said decree provided for an order of sale of the securities theretofore pledged to the defendant J. D. Spreckels & Bros. Company, plaintiff in said suit, and described therein, and proceedings to enforce said decree were stayed pursuant to said agreement of June 8, 1899, for the period of six months, and J. D. Spreckels & Bros. Company delivered to the Bank of California, the Trustee named in said agreement:

(a) Certificate for 10,001 shares of the capital stock of Coos Bay, Roseburg & Eastern Railroad & Navigation Company, theretofore pledged to the defendant J. D. Spreckels & Bros. Company by plaintiff, which said certificate was duly endorsed by said J. D. Spreckels & Bros. Company.

(b) 620 of the first mortgage bonds of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, being all of the bonds theretofore pledged by plaintiff herein to said J. D. Spreckels & Bros. Company.

(c) Assignments in proper form to said Trustee of all judgments of record rendered in the courts of Coos County, Oregon, in favor of J. D. Spreckels & Bros. Company, and then held by it as collateral security for the payments of money owing to defendant J. D. Spreckels & Bros. Company by plaintiff;

(d) All of the shares of the capital stock of Beaver Hill Coal Company excepting one share thereof issued

to each of the then directors of said company, and all of said shares of stock so issued to the directors were also by them endorsed and delivered to said Trustee;

(e) Satisfaction in proper form and duly acknowledged of said judgment rendered in the Superior Court of the City and County of San Francisco, State of California, in favor of defendant J. D. Spreckels & Bros. Company and against the plaintiff herein, for the sum of \$523,162.52 with interest;

(f) An agreement executed by A. B. Spreckels giving the plaintiff an option to purchase the interest of said A. B. Spreckels in certain real property in Coos County, State of Oregon, known as the "Chadwick Tract";

(g) A deed to certain real property in the Town of Marshfield, County of Coos, State of Oregon, executed by J. D. Spreckels & Bros. Company and plaintiff.

And this defendant alleges that J. D. Spreckels & Bros. Company duly kept and performed all of the terms and conditions of said agreement of June 8, 1899, required by said agreement to be kept and performed by it, the said J. D. Spreckels & Bros. Company.

That the plaintiff herein, pursuant to the terms and conditions of said agreement of June 8, 1899, delivered to the said Trustee, the Bank of California, in said agreement mentioned, the following:

(a) All of the shares of the capital stock of the Coos Bay, Roseburg & Eastern Railroad & Navigation

Company in excess of ten thousand and one shares delivered to the Trustee by J. D. Spreckels & Bros. Company, which certificates were properly endorsed.

(b) The resignation of all of the directors of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company then in office, the same to take effect upon the election of the directors named in said agreement.

(c) A release executed by the plaintiff discharging the Beaver Hill Coal Company from any and all claims and demands which the plaintiff herein might have against said company; said release not to take effect, however, except upon the failure of the said plaintiff to pay or cause to be paid to the Trustee, for the use and benefit of J. D. Spreckels & Bros. Company, the sum of \$550,000, as provided in said agreement of June 8, 1899.

(d) A release executed by the plaintiff releasing and discharging the Coos Bay, Roseburg & Eastern Railroad & Navigation Company from any and all claims and demands which the plaintiff herein might have or claim to have against said company.

IV.

That plaintiff wholly failed to pay or cause to be paid to said Trustee, or to anyone, for the benefit of J. D. Spreckels & Bros. Company, or anyone, within six months from the date of said agreement, or within any time, or at all, the said sum of \$550,000, or any

part thereof, as provided by said agreement; and that under the terms of said agreement, the title to all of the shares of stock of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and the bonds of said company, and real property and judgments assigned to or held by or standing in the name of said Trustee at the expiration of said six months from the date of the execution of such agreement, to-wit, on December 8, 1899, vested in and became the property of J. D. Spreckels & Bros. Company; and that thereby and by the terms of said agreement of June 8, 1899, the plaintiff released and discharged the railway company from any and all claims which he at that time or theretofore had or might have on account of salary, wages, or otherwise, and then and there and thereby released any and all claims that he then or theretofore or at any time had in or to any of said stock or bonds, or any of the property of the said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and then and there and thereby released and discharged the said J. D. Spreckels & Bros. Company from any and all claims which he then or there or at any time theretofore may have had against said J. D. Spreckels & Bros. Company.

That on the 15th day of December, 1899, pursuant to the provisions of said agreement of June 8, 1899, and at the request of J. D. Spreckels & Bros. Company, with the knowledge and consent of the plaintiff herein, the said Bank of California, as such Trustee, delivered to J. D. Spreckels & Bros. Company all of the capital stock of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, properly endorsed by the rec-

ord holders of said stock, and the 620 first mortgage bonds of said railroad, of the par value of \$1,000, and the said release and other documents required to be delivered by said agreement; and that pursuant to said agreement said plaintiff having failed and neglected to pay the said sum of \$550,000, or any part thereof, as required by said agreement, the said Trustee delivered to the said plaintiff, and the plaintiff accepted and received, pursuant to said agreement of June 8, 1899, the satisfaction of judgment entered in said suit mentioned in Paragraph 4 of said agreement, to-wit, a satisfaction of the judgment and decree rendered in the Superior Court of the City and County of San Francisco, in favor of J. D. Spreckels & Bros. Company, against R. A. Graham, for the sum of \$523,162.52, with interest thereon at six per cent per annum from the 1st day of April, 1898; and then and there accepted said release and satisfaction in full performance of the terms and conditions of said agreement to be kept and performed by the said J. D. Spreckels & Bros. Company.

That by the terms of said agreement dated June 8, 1899, all matters in controversy between plaintiff and the defendant J. D. Spreckels & Bros. Company, and between plaintiff and said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and between plaintiff and said Beaver Hill Coal Company, were settled and adjusted by said agreement, and upon the performance and execution of the terms of said agreement, said agreement operated as a satisfaction of all claims and demands and of all matters in controversy

between plaintiff and the defendant J. D. Spreckels & Bros. Company.

That thereafter, in violation of said agreement of June 8, 1899, the plaintiff refused to permit a meeting of the directors of said company, or to cause a meeting to be called, as required by Paragraph 7 of said agreement, for the re-organization of the Board of Directors of said company, or to permit the persons named in said paragraph to be elected to serve as directors during the life of said agreement, and until their successors should be elected and qualified, or otherwise to comply with the terms of said Paragraph 7, and thereby prevented the said J. D. Spreckels & Bros. Company from procuring a formal release to be executed by the Coos Bay, Roseburg & Eastern Railroad & Navigation Company discharging the said plaintiff from any and all claims which said company might have against the said plaintiff.

And this defendant for a second further and separate answer and defense to the plaintiff's amended complaint, alleges the following facts, to-wit:

I.

That the said defendant here repeats and adopts as a part of its second further and separate answer and defense, each and every allegation of Paragraphs I, II, III and IV of its first further and separate answer and defense, as if the same were fully written herein.

II.

That thereafter and on the 8th day of January, 1900, the said J. D. Spreckels & Bros. Company duly commenced in the Circuit Court of the United States for the District of Oregon, a suit in equity against the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and T. R. Sheridan, J. W. Bennett, R. A. Graham, F. N. McLean, O. J. Seeley, J. B. Hassett, and W. H. Trelease, praying the court for a decree that the said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, through its proper officers, should issue and deliver to the complainant, and to such persons as complainant should designate, certificates of stock of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, owned and held by J. D. Spreckels & Bros. Company, to-wit, 20,000 shares of the capital stock of said corporation; and that said company, through its proper officers, should register J. D. Spreckels & Bros. Company, and such persons as it might designate as the stockholders of said company, and that upon a final hearing a referee should be appointed to conduct a proper election of a Board of Directors of said company, and a proper organization of said company, in accordance with the rights of the stockholders thereof, so to be registered, and that judgment be entered in favor of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company against the said R. A. Graham, for such funds as might by said court be found to have been improperly diverted by said R. A. Graham from the property and assets of said railroad company, and that pending the termina-

tion of said suit, and until the further order of said court, a Receiver should be appointed to take charge of, manage, control and operate the property and assets of said railroad company.

That in the complaint filed in said action, the defendant J. D. Spreckels & Bros. Company, as complainant therein, alleged that it was then (on the 8th day of January, 1900), the owner of said 20,000 shares of the capital stock of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and was then also the owner of said 620 of the first mortgage bonds of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company.

That thereafter a subpoena ad respondendum was duly served upon all the said defendants in said suit; that thereafter, and on the 15th day of March, 1900, the said R. A. Graham duly filed a demurrer in said case, to said bill of complaint, and thereafter such proceedings were had in said court in said cause that on April 3, 1900, the demurrer of said R. A. Graham was overruled, and thereafter on the 6th day of August, 1900, said R. A. Graham did file his answer to the complaint filed by the defendant J. D. Spreckels & Bros. Company in said action, which said answer was verified by said R. A. Graham in person, and wherein and whereby said R. A. Graham, as defendant in said action, admitted that the defendant J. D. Spreckels & Bros. Company, as complainant in said action, was the owner of said 20,000 shares of the capital stock of said Coos Bay, Roseburg & Eastern Railroad & Navigation

Company, but denied that said defendant J. D. Spreckels & Bros. Company was the owner of said 620, or any number, of the first mortgage bonds of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company; and thereafter, and while said cause was pending, and on the 8th day of February, 1905, said R. A. Graham, as defendant in said cause, and the said J. D. Spreckels & Bros. Company, acting by and through their solicitors in said cause, made and entered into a stipulation in writing, and caused the same to be filed in said court and cause, in words and figures as follows, to-wit:

*In the Circuit Court of the United States for the
District of Oregon.*

J. D. Spreckels & Bros. Company, a corporation organized and existing under the laws of the State of California, and a citizen and inhabitant thereof,

Complainant,

vs.

Coos Bay, Roseburg & Eastern Railroad & Navigation Company, a corporation organized and existing under the laws of the State of Oregon, and a citizen and inhabitant thereof, and T. R. Sheridan, J. W. Bennett, R. A. Graham, F. H. McLean, O. J. Seeley, J. B. Hassett, and W. H. Trelease, citizens of the State of Oregon, and inhabitants thereof,

Defendants.

IT IS HEREBY STIPULATED, CONSIDERED AND AGREED that the answer heretofore filed herein by the defendant Robert A. Graham, be withdrawn, and that the complainant may have judgment as prayed for in the complaint, except the relief prayed for in the third division of the prayer of said complaint, to the effect that judgment be entered in favor of the defendant Coss Bay, Roseburg & Eastern Railroad & Navigation Company, against the defendant Robert A. Graham, for funds alleged to have been improperly diverted by the said Graham from the said railroad, and that such judgment be entered without costs as against the defendant Robert A. Graham, and without further notice.

Dated New York, Feb. 8, 1905.

R. A. GRAHAM,
Defendant.

WILLIAMS, WOOD & LINTHICUM,
Solicitors for Complainant.

State of New York,
County of New York,—ss.

On this 8th day of February, 1905, before me personally came Robert A. Graham, to me known to me to be the person described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

SARAH E. SINNIGAR,
Notary Public Kings County, Certificate filed in
New York County.

That said stipulation was duly filed in said court, in said cause, by the parties thereto, on July 19, 1907.

That thereafter and while said suit was pending upon said complaint and answer and replication duly filed in said cause, the Farmers' Loan & Trust Company, as complainant, duly commenced a suit on April 17, 1900, in the Circuit Court of the United States, for the District of Oregon, against the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and others, to foreclose the first mortgage executed by the said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and for the appointment of a Receiver in said cause; and that on May 1, 1900, said court in said cause duly appointed W. S. Chandler, as such Receiver, and thereupon and on said date said W. S. Chandler duly qualified as such Receiver, and took into his possession as such Receiver in said foreclosure suit, all the property and assets of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, which he had theretofore had in his possession as Receiver in said suit so brought by said J. D. Spreckels & Bros. Company against the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, hereinbefore set out.

That while said property was so in the possession of said Receiver, and the said Circuit Court of the United States was so in charge of the said property of the said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and while said suit so brought by the said J. D. Spreckels & Bros. Company against

the Coos Bay, Roseburg & Eastern Railroad & Navigation Company and others, including the plaintiff Graham, as above set forth, was pending and undetermined, the said stipulation of date February 8, 1905, was entered into and filed in said cause, and then and thereby all matters and things in dispute between the said J. D. Spreckels & Bros. Company and the said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and the said R. A. Graham, as to the meaning and effect, and as to the terms of the said agreement of June 8, 1899, were settled and compromised, and the said R. A. Graham then and thereby accepted the disclaimer and release of the said Coos Bay, Roseburg & Eastern Railroad & Navigation Company of its claim against him for an accounting, or for any sum, and then and there, and thereby, waived any claim of any kind which the said R. A. Graham may have had that the said J. D. Spreckels & Bros. Company had not complied with all the terms and provisions of the agreement of June 8, 1899, and had not procured a release to be executed by the said Coos Bay, Roseburg & Eastern Railroad & Navigation Company releasing him, the said R. A. Graham, from any claims that it might then or at any time have against him; and that thereafter, relying upon said stipulation and agreement so made between the said parties in said cause, and so filed in said cause, the Circuit Court of the United States, on July 19, 1907, entered its decree in words and figures as follows, to-wit, omitting title and caption of said cause therefrom:

“At this time complainant, by Williams Wood & Linthicum, its Solicitors, moving in open court that the bill of complaint filed in this cause be dismissed without prejudice, and it appearing that the demurrers of the defendants, T. R. Sheridan, J. W. Bennett, F. H. McLean, O. J. Seeley, J. B. Hassett, and W. H. Trelease, filed by said respective defendants, to the bill of complaint, have heretofore been sustained by this court, and that said bill of complaint has not been amended as to said respective defendants;

“And it furthermore appearing that by written stipulation of the respective parties, filed herein, the answer of the defendant R. A. Graham, has been withdrawn, and the defendant Coos Bay, Roseburg & Eastern Railroad & Navigation Company, having by its counsel in open court consented to the dismissal of said bill of complaint;

“And it furthermore appearing that by order of this court made in that certain suit filed by the Farmers’ Loan & Trust Company, as complainant, against the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, et al., as defendants, W. S. Chandler, originally appointed as the Receiver of the property of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, was in said other suit made Receiver of the property and assets of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and the receivership in this proceeding terminated;

“And it further appearing that in said other suit J. D. Spreckels & Bros. Company, as sole creditor of said Receiver, and Southern Pacific Company, owner of all of the capital stock and all of the bonds of said railroad company, have severally consented in writing to the dismissal of said other suit, and that the accounts of said Receiver should be deemed and considered as closed;

“IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED that the bill of complaint filed in this cause be and the same is hereby dismissed, without prejudice, and W. S. Chandler, originally appointed as Receiver of the property and assets of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, is hereby discharged from further duties as such Receiver, and the bond of said Receiver is hereby cancelled, and his sureties on such bond exonerated, and said Receiver is hereby directed to turn over unto the Coos Bay, Roseburg & Eastern Railroad & Navigation Company all property of said corporation which has come into and now is in the possession of such Receiver.

“Dated July 19, 1907.

(Signed) CHAS. E. WOLVERTON,
Judge.”

That the said Coos Bay, Roseburg & Eastern Railroad & Navigation Company then and thereby waived any and all claims of any kind which it then or at any

time had against said R. A. Graham, and that the said company has never at any time asserted or made any claim against said R. A. Graham, and that any and all claims which it might have had, were fully released and settled under and pursuant to said agreement of June 8, 1899, and under and pursuant to said agreement and stipulation so made in said cause, between plaintiff and the said J. D. Spreckels & Bros. Company on February 8, 1905, and by reason of said decree of said court entered in said cause pursuant to said stipulation, all matters in controversy between the plaintiff and the said Coos Bay, Roseburg & Eastern Railroad & Navigation Company and the said J. D. Spreckels & Bros. Company, were fully and finally settled, released and discharged, and by reason of the premises, all claims of every kind of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company against said R. A. Graham, have long since been prior to the commencement of this action, fully barred under the statute of limitations of the State of Oregon; and that by reason of the premises any and all disputes as to the meaning and effect and performance by either party of said agreement of June 8, 1899, have become settled, satisfied and all liabilities between the parties released and discharged; that by reason of all the matters and things hereinbefore stated, the plaintiff is and of right ought to be estopped to prosecute this action, or claim that the said release executed by him was not effective from and after December 15, 1899, and to claim that the said stock and bonds, and the whole thereof, did not belong to J. D. Spreckels & Bros. Company from and after

December 15, 1899, or to claim that he was the owner of said stock and bonds, or any thereof, on or about July 2, 1906, or to claim that the said J. D. Spreckels & Bros. Company and the defendant Southern Pacific Company unlawfully, wrongfully, or at all, or otherwise, converted said stock and bonds or either thereof by sale thereof by J. D. Spreckels & Bros. Company to Southern Pacific Company on said July 2, 1906, or at any time, or to maintain or prosecute this action against the said defendants, or either of them.

As a third further and separate answer to plaintiff's amended complaint, this defendant alleges that plaintiff has been guilty of laches in both the commencement and prosecution of this action, and in this behalf this defendant alleges that the defendant J. D. Spreckels & Bros. Company did, from on or about the 8th day of December, 1899, to on or about the 2nd day of July, 1906 (being the date of the sale of said stocks and bonds by the defendant J. D. Spreckels & Bros. Company to Southern Pacific Company), have the actual, open, notorious and exclusive use and possession of said stocks and bonds, and of each and all of them, and did so use and hold in its possession said stocks and bonds openly, notoriously, continuously and adversely and under a claim of right and ownership, which was hostile to the claim and right and possession of plaintiff, ever since on or about said 8th day of December, 1899, to on or about said 2nd day of July, 1906; that during all of said time plaintiff had knowledge that the defendant J. D. Spreckels & Bros. Company had the aforesaid actual, open, notorious and exclusive possession and

use of said stocks and bonds under such claim of right, and was in possession and control, and in the enjoyment of all the properties belonging to said Coos Bay, Roseburg & Eastern Railroad & Navigation Company either through the agents and employees of the defendant J. D. Spreckels & Bros. Company, or through the Receiver appointed at the request of said defendant J. D. Spreckels & Bros. Company, in the action entitled "The Farmers' Loan and Trust Company, Plaintiff, vs. Coos Bay, Roseburg & Eastern Railroad & Navigation Company, et al., Defendants," and which said last named suit is known and designated as No. 2616 upon the files of the above entitled court; that notwithstanding that the defendant J. D. Spreckels & Bros. Company during all of said times held and enjoyed such use and possession of said stocks and bonds, and under a claim of ownership and title thereto adverse to all claims of plaintiff therein, and notwithstanding plaintiff, during all of said times, had full knowledge that said defendant J. D. Spreckels & Bros. Company held and enjoyed such possession and use of said stocks and bonds under such claim of right, yet nevertheless plaintiff did sleep upon his alleged rights and did utterly fail and neglect to bring any action at law or equity in order to enforce his alleged rights in said stocks and bonds, until the 7th day of December, 1907, when this plaintiff did commence an action in the Circuit Court of the State of Oregon, in and for the County of Coos, entitled, "R. A. Graham, Plaintiff, vs. J. D. Spreckels & Bros. Company, a corporation, and Southern Pacific Company, a corporation, Defendants," which said action

was thereafter, on motion of the defendant J. D. Spreckels & Bros. Company, transferred to the United States Circuit Court in and for the District of Oregon (being the suit at bar); that thereafter plaintiff did not bring said last named action on to trial, but on or about the 17th day of January, 1916, did file in said last named action in the above entitled court, an amendment of his complaint, wherein said last named action was changed from an action at law to a suit in equity, and wherein a wholly different cause of action is set forth from that contained in plaintiff's original complaint; that this defendant has been greatly and seriously prejudiced and injured by plaintiff's delay and laches both in the commencement of said last named action on the 7th day of December, 1907, and by his failure to prosecute the same with diligence, and by his filing said amendment to said complaint wherein the whole theory and scope of plaintiff's action has been changed and altered.

As a fourth further and separate answer and defense to plaintiff's amended complaint, this defendant alleges:

I.

That for a period of more than six years prior to the commencement of this action, defendant J. D. Spreckels & Bros. Company was in the actual, notorious, open, exclusive, peaceable and lawful possession of all of the capital stock and mortgage bonds of said Coos

Bay, Roseburg & Eastern Railroad & Navigation Company mentioned and described in plaintiff's amended complaint herein, and under a claim of right and title to all of said shares of stock and to said 620 first mortgage bonds of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company; that on the 2nd day of July, 1906 (the date when the defendant J. D. Spreckels & Bros. Company did sell said capital stock and mortgage bonds of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company to this defendant, Southern Pacific Company), the defendant J. D. Spreckels & Bros. Company was the true and lawful owner of all of said capital stock and each and all of said 620 mortgage bonds of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and that at said time this plaintiff was without any right, title or interest in and to said capital stock, or any part thereof, or in and to said 620 first mortgage bonds, or any of them.

As a fifth further and separate answer and defense to plaintiff's amended complaint, this defendant alleges:

I.

That on or about the 8th day of January, 1900, while the defendant J. D. Spreckels & Bros. Company was in the actual, lawful, exclusive and peaceable possession of all of said 20,000 shares of said stock, and of 620 first mortgage bonds of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, the

said defendant J. D. Spreckels & Bros. Company did assert its sole ownership thereto and thereof, and did assert and claim that plaintiff herein had no right, title or interest whatsoever in or to said 20,000 shares of the capital stock, or any part thereof, or to said 620 first mortgage bonds, or any thereof, of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and said defendant J. D. Spreckels & Bros. Company did on or about the 11th day of January, 1900, notify and bring notice home to this plaintiff of such claim of ownership by said defendant J. D. Spreckels & Bros. Company in and to the whole of said 20,000 shares of the capital stock and in and to the whole of said 620 first mortgage bonds of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and this plaintiff did, on or about said 11th day of January, 1900, have full knowledge of the claim of sole ownership so made by the defendant J. D. Spreckels & Bros. Company of said 20,000 shares of stock, and said 620 bonds; that nevertheless said plaintiff did wholly fail and neglect, for a period of more than six years thereafter, to take any action at law or otherwise, either for the recovery of said 20,000 shares of stock, or any part thereof, or of said 620 or any of said bonds, and did wholly fail and neglect to assert any right, title, claim or interest against defendant J. D. Spreckels & Bros. Company in or to any portion of said 20,000 shares of stock, or in or to any portion of said 620 first mortgage bonds.

As a sixth further and separate answer and defense to plaintiff's amended complaint, this defendant alleges:

I.

That said action is barred by Section 335, Section 337, Subdivision 3 of Section 338, and Subdivision 4 of Section 338, of the Code of Civil Procedure of the State of California.

As a seventh further and separate answer and defense to plaintiff's amended complaint, this defendant alleges:

I.

That said action is barred by Sub. 4, of Section 6 of Lord's Oregon Laws; that said action is barred by Section 26 of Lord's Oregon Laws; that plaintiff's cause of action arose in the State of California; that plaintiff and defendants, at the time said cause of action arose, were non-residents of the State of Oregon; that at the time of the commencement of plaintiff's action herein, plaintiff's cause of action, if any, was barred under the laws of the State of California, and more particularly was barred by the provisions of the Code of Civil Procedure of the State of California, hereinabove in this answer particularly mentioned.

As an eighth further and separate answer and defense to plaintiff's amended complaint, this defendant alleges:

I.

This defendant here repeats and adopts, and alleges each and every allegation of Paragraphs I, II, III and IV of the first further and separate answer and defense, as if the same were fully written herein.

II.

That on the 20th day of June, 1906, the said J. D. Spreckels & Bros. Company was the owner of record, and in fact, and in possession of the property described in the amended complaint, and every part thereof, together with certain other property not involved herein, and that so being the owner and in possession of the said property, and the same standing upon the corporate records of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company in the name of J. D. Spreckels & Bros. Company, the Southern Pacific Company, without any notice or knowledge of any claim of plaintiff, in good faith, and for the sum of \$1,300,000 paid to the said J. D. Spreckels & Bros. Company, by Southern Pacific Company, purchased and acquired from the said J. D. Spreckels & Bros. Company the said stock and bonds and the whole thereof, described in the amended complaint, together with certain other property not involved herein, and the said stock and bonds, and the whole thereof, with said other property not involved herein, were thereupon and on said date by the said J. D. Spreckels & Bros. Company duly sold, conveyed, transferred and assigned, and the possession thereof delivered to the said Southern Pacific Company, and that the said Southern Pacific Company has ever

since been, and now is, the owner and in possession of the said property described in the amended complaint, and the whole thereof, with certain other property not involved herein.

WHEREFORE defendant prays that plaintiff's amended complaint be dismissed, and that it have judgment for its costs and disbursements against plaintiff.

P. F. DUNNE,
WM. D. FENTON,
MORRISON, DUNNE & BROBECK,
Attorneys for Defendant, Southern Pacific Co.

District of Oregon,
County of Multnomah,—ss.

I, Wm. D. Fenton, being first duly sworn, depose and say that I am the statutory Agent and Attorney in Fact, in Oregon, of Southern Pacific Company, one of the defendants in the above entitled suit; that the foregoing answer is true as I verily believe.

WM. D. FENTON,

Subscribed and sworn to before me this 5th day of April, 1916.

MABEL WOODWORTH,
Notary Public for the State of Oregon.

My Commission expires April 5, 1917.

(Seal)

District of Oregon,
County of Multnomah,—ss.

Due service of the within Answer is hereby accepted in Multnomah County, Oregon, this 5th day of April, 1916, by receiving a copy thereof, duly certified to as such by Wm. D. Fenton, of attorneys for defendant, Southern Pacific Company.

MARTIN L. PIPES,
Attorney for Plaintiff.

Filed April 5, 1916.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 10th day of April, 1916, there was duly filed in said Court and cause, a Reply to counterclaim in words and figures as follows, to-wit:

REPLY TO COUNTERCLAIM.

Now comes plaintiff, R. A. Graham, and by way of reply to the thirteenth further answer and defense to said action, pleaded by way of set-off or counterclaim:

Denies that the defendant, J. D. Spreckels & Bros. Company, whether relying upon said agreement of June 8, 1899, or for any other reason, or at all, or whether relying upon the stipulation made and entered into thereafter in the actions brought in said Circuit Court for the District of Oregon, or upon any other stipulation, or at all, surrendered all claim or any claim or

claims against said Coos Bay, Roseburg & Eastern Railroad & Navigation Company on account of advances of large sums or any sums of money made by said defendant, whether amounting in the aggregate to over Two hundred thousand (\$200,000.00) Dollars or any other sum.

Denies that said defendant expended the sum of Two hundred thousand (\$200,000.00) Dollars or any other sum or is entitled to an off-set on account of said or any other sum against any demand of plaintiff herein whether with interest thereon from April 1, 1898, at the rate of 6% per annum, or for any other period of time.

Denies that there is owing by plaintiff or that defendant J. D. Spreckels & Bros. Company is entitled to an offset in the further sum of \$203,029.09, whether with or without interest, at any rate, from February 8, 1905, or for any other period of time.

Denies that this plaintiff is indebted to the defendant J. D. Spreckels & Bros. Company on account of any of the sums or amounts or alleged expenditures set forth in the thirteenth further answer and defense to this action; denies that said defendant is entitled to any setoff with regard thereto; but plaintiff admits that in an accounting between said defendant and plaintiff the defendant J. D. Spreckels & Bros. Company will be entitled to claim as a part of the redemption fund for the stocks and bonds of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company the said sum of \$523,162.52, with interest from April

1st, 1898 until the date of the sale of said stocks and bonds to the defendant Southern Pacific Company, but not otherwise.

WHEREFORE plaintiff prays that said counterclaim and setoff be not allowed either as a setoff or by way of counterclaim and that plaintiff have decree upon such equitable terms as to the Court shall seem just and proper in the premises in accordance with the prayer and allegations of his amended bill heretofore filed herein.

J. L. McNAB,
MARTIN L. PIPES,
ROBERT M. REID,
Attorneys for Plaintiff.

United States of America,
State of California,
City and County of San Francisco,
Northern District of California,—ss.

ROBERT A. GRAHAM, being first duly sworn, deposes and says: That he is the plaintiff in the above entitled action; that he has read the foregoing reply to the setoff contained in the answer of defendant J. D. Spreckels & Bros. Company on file herein; that the same is true of his own knowledge except as to such matters as are therein alleged on information or belief, and that as to those matters he believes it to be true.

R. A. GRAHAM.

Subscribed and sworn to before me this 7th day of April, 1916.

(SEAL)

W. W. HEALEY,
Notary Public in and for the City and County
of San Francisco, State of California.

Received Copy April 7, 1916.

MORRISON, DUNNE & BROBECK,
Attorneys for J. D. Spreckels & Bros. Co.

WM. D. FENTON,
Attorney for S. P. Co.

Filed April 10, 1916.

G. H. MARSH, Clerk.

And afterwards, to-wit, on Monday, the 22nd day of May, 1916, the same being the 67th judicial day of the regular March, 1916 term of said court; Present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

FINAL DECREE.

This cause came on to be heard at this term upon the pleadings and the proofs, and was argued by counsel, and thereupon, upon consideration thereof.

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff's amended bill of complaint here-

in be and the same is hereby dismissed, with costs to the defendant to be taxed.

R. S. BEAN,
Judge.

Filed May 22, 1916.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 22nd day of May, 1916, there was duly filed in said Court and cause, an Opinion, in words and figures as follows, to-wit:

OPINION.

Portland, Oregon, Monday, May 22, 1916.

R. S. Bean, District Judge:

A careful consideration of this case in the light of the testimony, the argument of counsel, and authorities cited by them, confirms the view heretofore expressed that the contract of June 8, 1899, between plaintiff and defendant Spreckels & Bros. Company, was not a mortgage or pledge or continuing security for the payment of a debt, but was designed to and did put an end to the relation of debtor and creditor between them.

It is settled in law that no force will be given by a court of equity to an agreement of a mortgagor contained in a mortgage, or made contemporaneously therewith, that if he fails to make payment of the debt within a stated time the mortgagee shall become the absolute owner of the mortgaged property (27 Cyc. 1098). There seems, however, to be a conflict in the

authorities as to whether he can do so by a subsequent executory agreement fairly entered into. The courts of California, where the contract in suit was made and to be performed, recognized such a right (*Bradbury v. Davenport*, 120 Cal. 152). It is denied by other courts (*Holden L. & T. Co. v. Interstate T. Co.*, 123 Pac. 733).

But I do not deem it necessary to consider that question at this time because, in my judgment, the contract in suit was not a mortgage or pledge nor an agreement to cut off or bar an equity of redemption, but as stated on its face was for the purpose of completely adjusting all differences between the parties, not only growing out of the suit then pending in California, but other suits and actions in the courts of California and Oregon, and divers claims and demands made by one against the other and the corporations in which they were mutually interested. The reasons for this conclusion are stated in memorandum heretofore filed overruling the demurrer to the answer and need not be elaborated. The evidence, in my judgment, does not show that the contract was made under circumstances which render its enforcement unconscionable. It was voluntarily entered into by the plaintiff after days of negotiation with full knowledge of all the facts, under the advice of able counsel, and there is nothing in the testimony, so far as I can see, to indicate that plaintiff was overreached or imposed upon in any way in the making of the contract. It may be and perhaps is true that he was in straightened financial circumstances and believed that the contract promised the most feasible

way for him to save something out of his Coos Bay ventures, but if so it affords no legal reason why the contract should not be enforced as made.

The bill will therefore be dismissed.

Filed May 22, 1916.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 14th day of June, 1916, there was duly filed in said Court and cause, a Notice of Appeal in words and figures as follows, to-wit:

NOTICE OF APPEAL.

To Hon. R. S. Bean, Judge of the U. S. District Court for the District of Oregon, to J. D. Spreckels & Bros. Company and Southern Pacific Company, defendants, and to Messrs. Fenton & Fenton and Morrison, Dunne and Brobeck, attorneys for defendants:

You will please take notice that the complainant in the above entitled action hereby appeals, pursuant to order allowing such appeal to the U. S. Circuit Court of Appeals for the 9th Circuit of the United States, from the final decree made and entered in the above entitled action in favor of defendants and against the

plaintiff on the 22nd day of May, 1916, and from the whole of said decree.

JOHN L. McNAB,
MARTIN L. PIPES,
ROBERT M. REID,
Attorneys for Complainant.

Dated June, 1916.

Service of the within Notice of Appeal is hereby admitted this 14th day of June, 1916, at Portland, Oregon.

MORRISON, DUNNE & BROBECK,
WM. D. FENTON,
ALFRED A. HAMPSON,
Attorneys for Defendants.

Filed June 14, 1916.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 14th day of June, 1916, there was duly filed in said Court and cause, a Petition for Appeal in words and figures as follows, to-wit:

PETITION FOR APPEAL.

To the Honorable R. S. Bean, District Judge:

The above named Robert A. Graham feeling aggrieved by the decree rendered and entered in the above

entitled cause on the 22nd day of May, 1916, does hereby appeal from said decree to the U. S. Circuit Court of Appeals for the 9th Circuit, for the reasons set forth in the assignment of errors filed herewith, and prays that this appeal be allowed and that citation be issued, as provided by law, and that a transcript of the record proceedings, testimony and documents upon which said decree was based, duly authenticated, be sent to the U. S. Circuit Court of Appeals for the 9th Circuit under the rules such court in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of him be made.

JOHN L. McNAB,
MARTIN L. PIPES,
R. M. REID,

Solicitors and Attorneys for Robert A. Graham,
Plaintiff.

The foregoing claim of appeal was allowed.

R. S. BEAN,
U. S. District Judge Presiding in the above Named
Court.

Dated June 14, 1916.

Filed June 14, 1916.

G. H. MARSH, Clerk.

Service of the within Petition for Appeal is hereby admitted this 14th day of June, 1916, at Portland, Oregon.

MORRISON, DUNNE & BROBECK,
W. D. FENTON,
ALFRED A. HAMPSON,

Attorneys for Defendants.

Filed June 14, 1916.

G. H. MARSH, Clerk.

And afterwards, to-wit, on Wednesday, the 14th day of June, 1916, the same being the 86th judicial day of the regular March, 1916, term of said court; Present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

ORDER ALLOWING APPEAL.

Upon motion of Martin L. Pipes, Esq. solicitor and Counsellor for Robert A. Graham, plaintiff in the above entitled action, it is hereby ordered that an appeal to the U. S. Circuit Court of Appeals for the 9th Circuit, from the decree heretofore filed and entered herein be, and the same is hereby allowed, and that a certified transcript of the record testimony, exhibits, stipulations and all proceedings required by the parties be forthwith transmitted to said U. S. Circuit Court of Appeals for the 9th Circuit.

It is further ordered that the bond on appeal be fixed at the sum of Five Hundred (\$500.00) Dollars

Dated this 14th day of June, 1916.

R. S. BEAN,
Judge U. S. District Court Presiding.

Filed June 14, 1916.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 14th day of June, 1916, there was duly filed in said Court and cause, an Assignment of Errors, in words and figures as follows, to-wit:

ASSIGNMENT OF ERRORS.

Now comes Robert A. Graham, complainant in the above entitled case and files the following assignments of error upon which he will rely upon his prosecution of his appeal in the above entitled cause from the decree made by this honorable Court on the 22nd day of May, 1916.

I.

That the U. S. District Court for the District of Oregon erred in rendering its opinion and in making its order and decree dismissing the plaintiff's bill of complaint in this case.

II.

That the said court erred in deciding and decreeing that the plaintiff was not entitled to any form of equitable relief under the allegations and prayer of the plaintiff's bill of complaint.

III.

That the said court erred in making its decree dismissing plaintiff's amended bill of complaint and in determining that the facts proved and established on the trial did not warrant the court in granting any form of equitable relief to the complainant.

IV.

The said court erred in the making of its decree in determining that the contract of June 8, 1899, was a full and complete and final settlement between the parties to said contract and that no relief could be had against the same in equity.

V.

The court erred in deciding and determining that the facts stated in complainant's amended bill of complaint did not show that said contract of June 8, 1899, was entered into under circumstances of oppression and duress such as should entitle the plaintiff to relief against the enforcement of said contract.

VI.

The court erred in decreeing and determining that the plaintiff was not entitled to an accounting against the defendants in the said action.

VII.

The court erred in entering its decree dismissing the bill of complaint and in holding that the agreement of June 8, 1899, transferred the title to the plaintiff Graham's property to the defendant J. D. Spreckels & Bros. Company.

VIII.

The court erred in its decree dismissing plaintiff's bill of complaint and in deciding and finding that the indebtedness of the plaintiff Robert A. Graham to the defendant J. D. Spreckels & Bros. Company was extinguished by the making of the contract of June 8, 1899.

IX.

The court erred in making its decree and finding that by the making of the contract of June 8, 1899, the parties to said contract entered into a final and complete settlement of all of their rights relating to both litigation and property then in existence.

X.

The court erred in its decree and in deciding and finding that the plaintiff entered into said contract of June 8, 1899, under such circumstances that he was a free agent acting without oppression or duress in the premises.

XI.

The court erred in dismissing the plaintiff's bill of complaint and in decreeing that plaintiff was not en-

titled to redeem his properties under the agreement of June 9, 1899, entered into under the circumstances set forth in plaintiff's amended complaint.

XII.

The court erred in its decree of dismissal of plaintiff's amended bill of complaint and in deciding that by delivery of the muniments of title and other instruments under the contract of June 8, 1899, at the end of six months by Bank of California, the plaintiff's title to his property was extinguished.

XIII.

The court erred in its decree of dismissal and in deciding that plaintiff's ownership in and to the stock and bonds of the Coos Bay, Roseburg & Eastern Railway & Navigation Company passed to the defendant J. D. Spreckels & Bros. Company at the end of six months on delivery of the instrument.

XIV.

The court erred in deciding that the agreement of June 8, 1899, did not constitute either a mortgage or pledge or continuing security for the payment of debt and in deciding that the said instrument put an end to the relation of debtor and creditor between them.

XV.

The court erred in deciding and demanding that the agreement of June 8, 1899, was not an agreement

to cut off or bar the equity of redemption of the plaintiff R. A. Graham.

XVI.

The court erred in determining and deciding that the plaintiff R. A. Graham was neither overreached or imposed upon in the making of the said contract of June 8, 1899.

JOHN L. McNAB,
MARTIN L. PIPES,
ROBT. M. REID,

Solicitors and Attorneys for Complainant and
Appellant, Robert A. Graham.

Service of the within Assignment of Errors is hereby admitted this 14th day of June, 1916.

MORRISON, DUNNE & BROBECK,
WM. D. FENTON,
ALFRED A. HAMPSON,
Attorneys for Defendants.

Filed June 14, 1916.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 14th day of June, 1916, there was duly filed in said Court and cause, a Bond on Appeal, in words and figures as follows, to-wit:

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENT:

That we, Robert A. Graham, as principal, and Massachusetts Bonding and Insurance Company, a Massachusetts corporation as surety, are held and firmly bound unto the defendants in the sum of Five Hundred (\$500.00) Dollars, lawful money of the United States, to be paid to them and to their respective executors, administrators, successors and assigns: to which payment, well and truly to be made, we bind ourselves and each of us jointly and severally and each of our heirs, executors, administrators, successors and assigns, firmly by these presents.

Sealed with our seals and dated this 13th day of June, 1916.

WHEREAS, the above named Robert A. Graham has prosecuted an appeal to the U. S. Circuit Court of Appeals for the 9th Circuit to reverse the judgment and decree of the District Court of the United States for the District of Oregon, in the above entitled cause.

NOW THEREFORE, the condition of this obligation is such as if the above named Robert A. Graham shall prosecute his said appeal to effect and answer all costs if he fails to make good his plea and appeal then this obligation shall be void: otherwise to remain in full force and effect.

MASSACHUSETTS BONDING & INSURANCE CO,

GRANT E. SMITH,
Attorney in Fact.

(Seal, Massachusetts
Bonding & Insurance
Co.)

Approved this 14th day of June, 1916.

R. S. BEAN,
Judge District Court.

Filed June 14, 1916.

G. H. MARSH, Clerk.

And afterwards, to-wit, the 14th day of June, 1916,
there was duly filed in said Court and cause, a
Stipulation to send Original Exhibits to Court of
Appeals, in words and figures as follows, to-wit:

STIPULATION TO SEND ORIGINAL EX-
HIBITS TO COURT OF APPEALS.

It is hereby stipulated by and between counsel for
complainant and defendants that the following exhibits
may be forwarded by the Clerk of the District Court
above named to the Clerk of the Circuit Court of Ap-
peals, without the necessity for the same being printed
or copied into the printed transcript to be prepared by
the Clerk on appeal in the above entitled action.

1. Complainant's Exhibit No. 29 being an
original charter party between James Tuft agent
for the owner of the schooner "Peerless" and

Robert A. Graham by J. D. Spreckels & Bros. Company, dated August 27th, 1897.

2. Complainant's Exhibit No. 38 being original profiles of the Coos Bay, Roseburg & Eastern Railroad and Navigation Company.

3. Reports of W. S. Chandler, receiver of the Coos Bay, Roseburg & Eastern Railroad and Navigation Company filed among the papers in the case of Farmers' Loan & Trust Company vs. Coos Bay, Roseburg & Eastern Railroad and Navigation Company, being judgment roll No. 2934 of this Court.

4. Account rendered by J. D. Spreckels & Bros. Company to R. A. Graham—Complainant's Exhibit 46.

JOHN L. McNAB,
MARTIN L. PIPES,
ROBT. M. REID,

Attorneys for Complainant.

MORRISON, DUNNE and
BROBECK,
FENTON, DEY,
HAMPSON & FENTON,

Attorneys for Defendants.

Filed June 14, 1916.

G. H. MARSH, Clerk.

And afterwards, to-wit, on Wednesday, the 14th day of June, 1916, the same being the 86th judicial day of the regular March, 1916, term of said Court; Present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

ORDER TO SEND ORIGINAL EXHIBITS TO COURT OF APPEALS.

Agreeably to the recorded stipulation of the parties, filed herein, the Clerk of the above named court is hereby ordered to send to the Clerk of the Circuit Court of Appeals for the 9th Circuit the following original exhibits, without printing the same in the transcript on appeal or making a copy thereof.

1. Complainant's Exhibit No. 29 being an original charter party between James Tuft agent for the owner of the Schooner "Peerless" and Robert A. Graham by J. D. Spreckels & Bros. Company, dated August 27th, 1897.

2. Complainant's Exhibit No. 38 being original profiles of the Coos Bay, Roseburg & Eastern Railroad and Navigation Company.

3. Reports of W. S. Chandler, receiver of the Coos Bay, Roseburg & Eastern Railroad and Navigation Company filed among the papers in the case of Farmers' Loan & Trust Co. v. Coos Bay, Roseburg & Eastern Railroad and Navigation Company, being judgment roll No. 2934 of this Court.

4. Account rendered by J. D. Spreckels & Bros. Company to R. A. Graham—Complainant's Exhibit 46.

R. S. BEAN,

U. S. District Judge for the District of Oregon.

Dated June 14th, 1916.

Filed June 14, 1916.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 10th day of July, 1916, there was duly filed in said Court and cause, Defendants' Praeipe for Transcript, in words and figures as follows, to-wit:

DEFENDANTS' PRAECIPE FOR TRANSCRIPT.

Respondents' Praeipe for Preparation of Record.
To G. H. Marsh, Clerk of the District Court above named:

You will please incorporate in the record for the transcript to be printed in the above entitled suit on appeal, by preparing for the printer under appropriate certificate, in addition to that matter included in the praecipe of appellant, the following:

I.

Opinion of the court sustaining in part and overruling in part the demurrer of plaintiff to the answers

of defendants while said case was pending as an action at law.

II.

The answers of both defendants to the amended complaint of plaintiff.

FENTON, DEY, HAMPSON &
FENTON,
MORRISON, DUNNE & BROBECK,
Attorneys for Respondents.

District of Oregon,
County of Multnomah,—ss.

Due service of the within praecipe is hereby accepted in Multnomah County, Oregon, this 16th day of July, 1916, by receiving a copy thereof, duly certified to as such by Alfred A. Hampson, of attorneys for defendants.

MARTIN L. PIPES,
Of Attorneys for Plaintiff.

Filed July 10, 1916.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 19th day of September, 1916, there was duly filed in said Court and cause, Plaintiff's Amended Praecipe for Transcript, in words and figures as follows, to-wit:

PLAINTIFF'S AMENDED PRAECIPE FOR
TRANSCRIPT.NEW AND AMENDED PRAECIPE FOR
PREPARATION OF RECORD.

To G. H. Marsh, Clerk of the District Court above
named:

The former praecipe for preparation of record having through inadvertence been filed prior to the filing of the statement of evidence in accordance with Equity Rule No. 75, and said praecipe not having been acted upon and the plaintiff now filing the statement of evidence in accordance with Equity Rule No. 75,

You will please prepare the record for the transcript to be printed in the above entitled action on appeal by preparing for the printer, under appropriate certificate, the following:

1. Original complaint.
2. Order allowing amended complaint to be filed.
3. Amended complaint.
4. Answer to amended complaint.
5. Plaintiff's answer to counterclaim set up in defendants' answer.
6. Judgment of dismissal.
7. Notice of appeal.
8. Order allowing appeal and petition for appeal.
9. Bond on appeal.
10. Citation.

11. Assignments of errors.
12. Stipulations for forwarding original exhibits,
13. Clerk's certificate to accompany reporter's transcript.
14. Clerk's certificate to transcript.
15. Orders sending up original exhibits.
16. Statement of evidence filed with you at the time of filing this praecipe.

Yours respectfully,

J. L. McNAB,
ROBT. M. REID,
MARTIN L. PIPES,
Attorneys for Appellant.

Receipt of a copy of the within new and amended praecipe for preparation of record is hereby admitted this 15th day of September, 1916.

MORRIS, DUNNE & BROBECK,
PETER F. DUNNE, W. D. FENTON, ED-
WARD HOHFELD,
Attorneys for Appellees.

Filed September 19, 1916.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 21st day of September, 1916, there was duly filed in said Court and cause, a Stipulation to send additional Exhibits to the

Court of Appeals, in words and figures as follows, to-wit:

STIPULATION TO SEND ADDITIONAL EXHIBITS TO COURT OF APPEALS.

STIPULATION.

It is hereby stipulated and agreed in addition to a former stipulation as to the sending up of original records to the Circuit Court of Appeals in the above entitled action that the following original records may be transmitted by the Clerk of the District Court of the United States in and for the District of Oregon to the Circuit Court of Appeals to be considered as a part of the record in the above entitled action, namely:

1. In the Circuit Court of the United States for the District of Oregon, being Judgment Roll in this Court No. 2388, *J. D. Spreckels and Bros. Company, a corporation, v. Coos Bay, Roseburg and Eastern Railroad and Navigation Company, a corporation, et als.*

2. In the Circuit Court of the United States for the District of Oregon, being Judgment Roll in this Court No. 2487, *R. A. Graham v. Beaver Hill Coal Company, et als.*

3. In the Circuit Court of the United States for the District of Oregon being Judgment Roll in this Court No. 2933, *J. D. Spreckels and Bros. Company, a corporation, v. Coos Bay, Roseburg*

and Eastern Railroad and Navigation Company, a corporation, et als.

4. In the Circuit Court of the United States being Judgment Roll in this Court No. 2934, Farmers' Loan and Trust Company, a corporation, v. Coos Bay, Roseburg and Eastern Railroad and Navigation Company, a corporation, et als.

5. The original deposition of Isaac Frohman taken and filed in this action of Graham v. Spreckels, et al, with all the exhibits thereunto attached, and made a part thereof.

6. Complainants' Exhibit No. 45 being deed from J. D. Spreckels and Bros. Company, a corporation, to Southern Pacific Company, a corporation, dated July 2, 1906, and recorded July 31, 1906.

J. L. McNAB,
ROBT. M. REID,
MARTIN L. PILES,
Attorneys for Appellant.

MORRISON, DUNNE & BROBECK,
FENTON, DEY, HAMPSON & FENTON,
Attorneys for Appellees.

Reserving, however, all exceptions and objections to settlement of statement of evidence and preparation of record on appeal, etc.

Filed September 21, 1916.

G. H. MARSH, Clerk.

And afterwards, to-wit, on Wednesday the 29th day of November, 1916, the same being the 21st judicial day of the regular November, 1916, term of said Court, the following proceedings were had in said cause, before the Honorable Robert S. Bean, District Judge, viz:

**ORDER TO SEND ORIGINAL EXHIBITS TO
COURT OF APPEALS.**

It is hereby stipulated that the Court may sign the order hereinafter set forth.

**J. L. McNAB,
MARTIN L. PIPES,
ROB'T REED,**
Attorneys for Appellant.

**MORRISON, DUNNE & BROBECK,
FENTON, DEY, HAMPSON & FENTON,**
Attorneys for Appellees.

**ORDER FOR THE TRANSFER OF
ORIGINAL EXHIBITS.**

Agreeably to the foregoing stipulation, it is hereby ordered that the Clerk of the District Court, above named, send to the Circuit Court of Appeals to be used on appeal therein, the following original exhibits:

1. In the Circuit Court of the United States for the District of Oregon, being Judgment Roll in this Court No. 2388, J. D. Spreckels and Bros. Company, a corporation, v. Coos Bay, Roseburg

and Eastern Railroad and Navigation Company, a corporation, et als.

2. In the Circuit Court of the United States for the District of Oregon, being Judgment Roll in this Court No. 2487, *R. A. Graham v. Beaver Hill Coal Company, et als.*

3. In the Circuit Court of the United States for the District of Oregon being Judgment Roll in this Court No. 2933, *J. D. Spreckels and Bros. Company, a corporation, v. Coos Bay, Roseburg and Eastern Railroad and Navigation Company, a corporation, et als.*

4. In the Circuit Court of the United States being Judgment Roll in this Court No. 2934, *Farmers' Loan and Trust Company, a corporation, v. Coos Bay, Roseburg and Eastern Railroad and Navigation Company, a corporation, et als.*

5. The original deposition of Isaac Froham taken and filed in this action of *Graham v. Spreckels, et al*, and with all the exhibits thereunto attached, and made a part thereof.

6. Complainant's Exhibit No. 45 being deed from *J. D. Spreckels and Bros. Company, a corporation*, to *Southern Pacific Company, a corporation*, dated July 2, 1906, and recorded July 31, 1906.

7. Complainant's Exhibit No. 29 being an original charter party between *James Tuft*, agent for the owner of the Schooner "*Peerless*," and

Robert A. Graham by J. D. Spreckels & Bros. Company, dated Aug. 27th, 1897.

8. Complainant's Exhibit No. 38 being original profiles of the Coos Bay, Roseburg & Eastern Railroad and Navigation Company.

9. Reports of W. S. Chandler, receiver of the Coos Bay, Roseburg & Eastern Railroad and Navigation Company filed among the papers in the case of Farmers' Loan and Trust Co. v. Coos Bay, Roseburg & Eastern Railroad and Navigation Company, being Judgment Roll No. 2934 of this Court.

10. Account rendered by J. D. Spreckels & Bros. Company to R. A. Graham, complainant's Exhibit No. 46.

R. S. BEAN,
Judge District Court.

Dated November 24, 1916.

Filed November 29, 1916.

G. H. MARSH, Clerk.

And, to-wit, on the 30th day of October, 1916, there was duly filed in said Court and cause, a Statement of the Evidence, in words and figures as follows, to-wit:

*In the District Court of the United States, in and for
the District of Oregon.*

R. A. Graham,

Plaintiff,

vs.

J. D. Spreckels & Bros. Company, a corporation,
and Southern Pacific Company, a corporation,
Defendants.

STATEMENT OF EVIDENCE UNDER
EQUITY RULE 75.

BE IT REMEMBERED, That on the trial of this cause, in this Court, at the Term thereof, on April 18, 19, 20, 1916, before the Court sitting in Equity, the Honorable ROBERT S. BEAN, District Judge, presiding, JOHN L. McNAB, Esq., MARTIN L. PIPES, Esq., and ROBERT M. REID, Esq., appearing on behalf of plaintiff, and MORRISON, DUNNE & BROBECK (PETER F. DUNNE, Esq., and EDWARD HOHFELD, Esq.), W. D. FENTON, Esq., and A. A. HAMPSON, Esq., appearing on behalf of defendants, the following proceedings were had and testimony taken:

On Monday, April 17, 1916, Mr. McNab made his opening statement on behalf of plaintiff.

Thereupon the plaintiff, to sustain the issues upon its part, offered the evidence of the witnesses hereinafter named, and the documents hereinafter set forth, as its evidence in chief, in the manner, form and substance following:

R. A. GRAHAM, the plaintiff, called in his own behalf, after being first duly sworn, testified as follows:

I am the plaintiff in the action. Of the firm of J. D. Spreckels & Brothers Company I know Mr. John D. Spreckels, A. B. Spreckels, F. S. Samuels. In dealing with the firm of J. S. Spreckels & Bros. Company I dealt with most all of the members of the firm sometimes one and sometimes the other. I understood Mr. John D. Spreckels was always the president; Mr. A. B. Spreckels vice-president; and Mr. Hugg was secretary, as I understood. Mr. Samuels signed himself as acting secretary. In 1890 I had headquarters at San Diego; my business was railroad contracting, railroad building. About 1890, I went to Marshfield, Oregon, to look over the building of the Coos Bay, Roseburg & Eastern Railway—take contracts. At that time the corporation known as the Coos Bay, Roseburg & Eastern Railway & Navigation Company had been incorporated. I was invited there by the directors of the road looking forward to the taking of the contract of building the road; I went up there to examine it. I did enter into such a contract with the directors. I made arrangements relative to the taking over of the corporation known as the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, agreeing to build the road, to take the stocks of the company and the right to issue the bonds of the company, and the subsidies that were subscribed by the various citizens of Marshfield, Myrtle Point, Bandon, Coquille and Roseburg, to aid the construction of it; take over what was called the subsidy list of the subscribers; take over the lands at Marshfield, Oregon, known as

Railroad Addition to Marshfield, in the alternate blocks. The corporation was incorporated for \$2,000,000, divided into 20,000 shares of \$100 each par value. In the incorporation of that company, or its reorganization, these stocks that belonged to me were issued to others; all but six or seven shares were issued to one O. J. Seeley for me. I think 19,994 or 19,995 were issued to O. J. Seeley. After entering into the contract with the Coos Bay Railroad I proceeded with its construction. First I sent up engineers to make a notation, and make the surveys. Later I sent up horses and equipment to build the grade, and bridge equipment to build the bridges. Prior to the time that I had any negotiations or connection with the firm of J. D. Spreckels & Bros. Company in the way of construction I had not done anything except to start in the engineering, the location of the line, until after I had my understanding with J. D. Spreckels at the Coronado Hotel, probably within a month, or less than a month after I had closed the contract. Up until that time I had had no business relations with Mr. Spreckels. At the Coronado Hotel we discussed this contract, and the possibilities of the road up in that territory. I asked him if he would like to go in with me and help finance it, and finance the bonds. Among the first things to be done, we wanted some more rails, which I wanted him to provide. He asked me how many rails I wanted; I told him thirty miles approximately, to carry us to Myrtle Point the first thing. We did not have more than ten or fifteen minutes discussion about that when he said he would do it. He went to the telegraph office; he telephoned to his firm in San Francisco to buy

these rails in the east and have them brought to San Francisco. After that conversation with Mr. Spreckels and before the rails arrived I proceeded and did the grading, and all of the bridging except two trestles, within a mile of Coquille City; Coquille City was about seventeen miles from Marshfield according to the grade of the railroad. Up to the time we got to Coquille, we had not received the rails. We first got rails from Spreckels Brothers (the firm of J. D. Spreckels & Bros. Company will sometimes be referred to as "Spreckels Brothers") along in the early summer of '91. I first became indebted to Spreckels Brothers on account of those rails or on account of anything else when they delivered those rails early in the summer of '91. I did not take the entire cargo of rails which I had ordered. I took ten miles of rails. The others were sold; some of them to a company of their own at Watsonville to build a railroad there; others were sold to a company in Seattle. These others rails were relinquished by the mutual consent of everybody. In return for the rails which I received I gave to Spreckels two notes of seventeen thousand dollars each, a total of thirty-four thousand dollars, which were endorsed by Mr. J. W. Collins, then president of the California National Bank at San Diego. That was all the indebtedness that we incurred up to 1892, probably mid-summer of '92, when I made a different arrangement with them; in the beginning of that arrangement they let me have ten thousand dollars more in cash, which was the commencement of the final arrangements which carried us on to Myrtle Point. Subsequently I entered

into a written agreement with J. D. Spreckels & Bros. Company relative to their financial interest in this railroad. On being shown this instrument I identify it as the written agreement.

Counsel for plaintiff thereupon offered the instrument in evidence, which was admitted by the Court, and marked: "Complainant's Exhibit No. 1," and is as follows:

" The understanding and agreement between the
"undersigned is as follows:

" That in consideration of certain advances,
"made by Messrs. J. D. Spreckels & Bros. Com-
"pany to R. A. Graham, for the purpose of enab-
"ling said R. A. Graham to pursue the construc-
"tion of the Coos Bay, Roseburg & Eastern Rail-
"road from Marshfield to Myrtle Point, as per his
"contract with said railroad, that said R. A. Graham
"is to deposit in the hands of Messrs. J. D. Spreck-
"els & Bros. Co., all the bonds of said railroad is-
"sued and to be issued from No. 1 to and including
"No. 663, also the majority of capital stock of said
"railroad corporation as security for advances made
"by Messrs. J. D. Spreckels & Bros. Co. Interest
"at 7 per cent per annum to be charged on entire
"account, and 5 per cent bonus on advances made
"on and after September 3rd, 1892. It is further
"agreed that any negotiations for sale of bonds
"shall be conducted through Messrs. J. D. Spreckels
"& Bros. Company, who are to receive 10 per cent
"commission on gross receipts of such sale, and are

“also to receive 10 per cent commission on amount
“of profit in cost of construction of road from Myr-
“tle Point to Roseburg, should said R. A. Graham,
“or his heirs or assigns perform the work.

“ J. D. Spreckels & Bros. Co.,
“ F. S. Samuels.”

(Witness continuing): I accepted that instrument, signed by J. D. Spreckels & Bros., but not signed by myself. Prior to and about the time that the agreement marked “Complainant’s Exhibit 1” was entered into, an investigation was made by a Mr. Creighton, who had been sent to the ground by Mr. Spreckels’ company, of the Coos Bay Railroad, prospects, land, subsidies and the like. This report was made in writing.

((Counsel for plaintiff shows witness report purporting to be the report of Mr. Creighton.))

(Witness continuing): I can state that this is a copy of the report or the report made by Mr. Creighton, who was sent up there about the date of that report, ’92; August or September of ’92.

(Counsel for plaintiff thereupon offered the report in evidence, which was admitted by the Court, and marked: “Complainant’s Exhibit No. 2,” and is as follows):

“ OREGON, ROSEBURG & EASTERN
“ RAILROAD & NAVIGATION
“ COMPANY.

“ *General Remarks.*

“ In accordance with instructions, I proceeded
“by rail to Roseburg, the proposed eastern terminus
“of the Coos Bay, Roseburg & Eastern Railroad
“and Navigation Company’s road. From thence
“I traveled by wagon over the new stage road to
“Marshfield, at the head of Coos Bay, a distance
“of about 100 miles, Marshfield being the western
“terminus of the above named railroad, and the
“point where the cars touch tide water. There is
“an old stage road thirty miles shorter, but as it
“crosses a high mountain on a very steep grade,
“it is seldom traveled.

“ The projected line of railroad from Roseburg
“to Marshfield practically parallels the new stage
“road, but on a much easier grade. Where it de-
“viates from this natural route of travel, it traverses
“fertile valleys, partially occupied and capable of
“supporting a considerable agricultural population.
“The entire distance of the railroad between ter-
“minal points will be ninety-seven miles. From
“the nature of the country, so far as I am able to
“form an opinion and after minute and frequent
“inquiries from persons thoroughly familiar with
“the topography of the entire region, I do not think
“that a better line for a railroad between Roseburg
“and Marshfield could be located, having respect to

“cost of construction, working expenses and probable revenue; nor is there any practicable route by which it could be paralleled.

“ While at Roseburg I interviewed several prominent people on the prospect of the Coos Bay, Roseburg & Eastern Railroad as a paying enterprise upon completion, and they were unanimous in the opinion that it would certainly be a profitable investment if economically built and operated. Among these were Hon. B. Herman, Congressman from Southern Oregon, a large property owner in Coos County, and who was brought up in the country; T. R. Sheridan, merchant and banker, Roseburg, and president of the C. B., R. & E. R. R. & N. Co.; Mr. Crawford, U. S. Land Registrar for the District, and Mr. Fisher, newspaper editor and proprietor. I also interviewed others who had no apparent interest in booming the enterprise or misrepresenting the resources of the district, and the conclusion was the same in each case, that unless an outlet by sea at Coos Bay is opened, this fertile region, comprising an area of 5,000 square miles, cannot be developed. The soil is fertile, the valleys producing wheat, corn, potatoes, fruit, hops and hay. It also raises fine horses, cattle and sheep which give a high grade of wool. The mountains and uncleared valleys are covered with heavy timber and abound in minerals; but the cost of transportation to market is practically prohibitory of development. The railroad freight from Roseburg to Portland, 198 miles,

“is 37c per 100 pounds, to which river transportation, 132 miles, as well as sea freight to the port of destination are to be added.

“ Before the Southern Pacific R. R. Co. secured the railroad from Roseburg to Portland, a great deal of grain was shipped from the Umpqua and Rogue River Valleys to Portland, but since the change of management of the road and consequent increase in freight, the farmers have thrown much of their land into grass or out of cultivation, and this season there is not one-third the quantity of grain raised in this district as there has been before the railroad combination spoken of. Mr. Herman stated that he knew farmers with two season's crops on hand who did not know what to do with it. With an available outlet by Coos Bay, the area under crop would rapidly increase, and an outlet would also be had for the timber and coal which are now practically unavailable except in the immediate vicinity of the sloughs of Coos Bay. While San Francisco is recognized as the principal market for the products of this region, the grade over the Siskiyou range and long haul to Oakland, effectually cut it off from San Francisco by this route.

“ A line of railroad from Roseburg to Coos Bay would shorten the distance and greatly reduce the cost of transportation to market. A comparison with the Portland route, which is the only practicable one at present, will show this:

“ Roseburg to Portland, 198 miles; Portland
“to Columbia River Bar, 132 miles; thence south
“to opposite Coos Bay Bar, 180 miles—total dis-
“tance from Roseburg to the entrance of Coos Bay
“harbor, from Roseburg via Portland, 510 miles.

“ Roseburg to Marshfield by projected Coos
“Bay Railroad 97 miles; Marshfield to Coos Bay
“Bar, 17 miles—total 114 miles.

“ Difference in favor of Roseburg and Coos
“Bay route, 586 miles.

“ This country is well supplied with flouring
“mills. The following are roller mills of about 75
“barrels daily capacity: 1 steam mill at Oak-
“land, ten miles from Roseburg; 1 at Roseburg,
“water power; 1 at Myrtle Creek, 15 miles south
“of Roseburg; 1 at Canyonville, 6 miles south of
“Myrtle Creek; 1 at Elkins, besides several grist
“mills.

“ *Territory naturally tributary to the Coos Bay*
“*and Roseburg R. R.*

“ The topographical features of the country
“tributary to the projected railroad to Coos Bay
“are so clearly defined as to leave no room for
“doubt on the subject. The entire region is
“bounded by high mountain ranges, which form
“the watershed of Rogue River, the Umpqua and
“Coquille Rivers, Coos River and lesser streams
“which, passing through and watering successive
“chains of valleys, reach the sea at various points

“not many miles apart. Coos Bay is the only har-
 “bor of any importance in this stretch of country
 “and is the only estuary upon which a maritime
 “port can be established. This region embraces
 “the whole of four counties in Southwestern Ore-
 “gon, and part of a fifth. Their respective area
 “and population, according to the census of 1890,
 “are as under:

		Sq miles.
“	Douglas 15,000 population	4875
“	Jackson 12,500	“ 2880
“	Coos 7,000	“ 1750
“	Josephine 5,000	“ 1605
“	Curry (part) 1,400	“ 1590

“ Omitting the county of Curry, which abuts
 “upon Del Norte County, California, and which
 “is rather remote, there is a region of 11,110 square
 “miles, with vast undeveloped resources in timber
 “and minerals, containing numerous fertile valleys
 “with a mere handful of 39,500 people located in
 “the various towns, and distributed in mining and
 “logging camps, and on rich bottom lands along the
 “larger streams. This country is undeveloped,
 “and it cannot be developed unless an outlet is
 “found at Coos Bay harbor.

“ There is a small harbor at Bandon, inside Co-
 “quille River bar, but the water on the bar is shal-
 “low, and before the United States Government
 “harbor improvements were begun, at certain
 “stages of the tide in the Fall a person could wade

“across it. Small schooners of 150 tons cross this
“bar, on which from six to eight feet of water may
“now be found at high tides. The services of a
“tug are required. There are said to be five or
“six of these vessels in the trade between Coquille
“River and San Francisco, but the freight service
“is unsatisfactory as farmers cannot look for re-
“turns inside of a month or six weeks. Bad as it
“is, it is the only outlet at present available to the
“settlers along the Coquille River bottom for ship-
“ping their products. A canal was projected
“across the mile of isthmus separating the Coquille
“from the upper waters of Coos Bay, but the
“scheme was abandoned owing to the cost. The
“railroad from Marshfield to Coquille City will ren-
“der its construction unnecessary in the future, and
“provide the needed outlet for the Coquille valley
“up to the head of navigation on the Coquille river
“at Myrtle Point, which is the distributing center
“for a large timber and mining territory.

“ *Mineral and Timber Resources.*

“ In past years a great deal of gold was taken
“out of the Rogue river bars and from quartz mines
“in that section of country. Placer and bar min-
“ing still goes on to a limited extent. An import-
“ant discovery has recently been made about 18
“miles southeast of Roseburg, on the line of the
“Southern Pacific R. R. and six miles from the
“way station. The company has built a ditch, 30
“miles in length, to bring the water from the east

“branch of the North fork of the Umpqua river,
“and is taking out a good deal of gold. Another
“company—the Canyonville Co.—has surveyed a
“ditch line in the same neighborhood of about equal
“length. Coal has been discovered but not worked.
“The country is heavily timbered. There is a
“quicksilver mine near Oakland, a station on the
“S. P. Railroad, 10 miles north of Roseburg.

“ A marble quarry has been opened east of Rose-
“burg, distant six miles, and a car of blocks was
“recently shipped to Colfax, Washington. It is
“also shipped in small quantities to Portland. I
“saw several pieces worked into monuments, and
“they took a fine polish. The marble is variegated;
“there is no white among it. The local company
“is without capital to develop their property.

“ There is a great deal of coal, especially east-
“erly of Roseburg on the North Umpqua, but there
“is no capital to develop it, and it could not now
“be shipped to market.

“ The Riddles Nickel mine, on which a plant
“costing about \$250,000 has recently been erected,
“is located 25 miles south of Roseburg on the line
“of the Oregon division of the S. P. railroad, five
“miles from the track. A large working force is
“employed. This mine could be reached by the
“projected Coos Bay & Roseburg Railroad at a
“point ten miles from Roseburg and six miles by
“trail or road from the cars.

“ There is a very large body of timber—some
“sugar pine, white Oregon pine, cedar and myrtle
“—along the line of the Coos Bay railroad and
“easterly up the Umpqua; but it is only used lo-
“cally to build up the country as it cannot be sent
“to market. The white pine, known as Port Or-
“ford pine, is of special commercial value.

“ Gold mines are being developed in the moun-
“tains 30 miles from Myrtle Point, and a wagon
“road has been built part of the way to enable
“machinery to be taken up to crush the quartz.
“The quartz is said to be rich. Nickel has also
“been discovered in this section of the country.
“There are also well-defined veins of coal, but no
“development. The entire region is heavily tim-
“bered except on the river bottom where clearances
“have been made, or on marsh land.

“ I obtained my information regarding the
“Myrtle Creek territory from Mr. Bender, mer-
“chant, of the firm of Wise & Bender, Mr. Her-
“man, brother of the Congressman, and other old
“residents. Myrtle Creek is a thriving little town
“and is well placed as a distributing point, being
“located at the junction of the five forks of the
“Coquille River.

“ *Location of the Railroad.*

“ As already stated, the Coos Bay and Rose-
“burg railroad practically parallels the new stage
“road from Roseburg to Marshfield. Starting

“from Roseburg westward, the line follows the
“south fork of the Umpqua River, through a good
“farming country for several miles; thence through
“Ten Mile, Looking Glass and Camas Valleys, a
“distance, roughly speaking, of fourteen miles;
“thence through a pass to the watershed of the
“middle fork of the Coquille river, and following
“the course of that stream to the level country at
“Myrtle Point, where the various branches or forks
“join and from the Coquille River, which is nav-
“igable for light draft steamers from that point
“to the entrance. After leaving Camas Valley the
“line traverses a fine timber belt for twenty-three
“miles. The railroad will give the only outlet for
“the timber. From Myrtle Point to Coquille City,
“situated at the end of the portage from King’s
“landing on Coos Bay, the projected railroad will
“run along the river bottom a distance of nine
“miles; and from Coquille City to Marshfield, on
“Coos Bay, a distance of seventeen miles, the road
“will run through an agricultural and partially
“wooded country. The timber near the railroad
“and back of it in the valleys between the moun-
“tains spurs, on these divisions of the line, cannot
“be utilized to advantage at present, although there
“is a good deal of logging done; but the timber has
“been cut back from the waterways, and the logs
“are now hauled by bullock-teams to the mills.

“ The region between Myrtle Point and Marsh-
“field contains coal, but the principal deposits,
“some of which have been worked for thirty to

“forty years, lie between Coquille City and Marsh-
“field, more especially on the slough of Coos Bay
“running up to King’s landing.

“ Of these mines, only the Newport mine, be-
“longing to the Luning estate, is now being
“worked, and it is said to be the most inferior coal
“in the district. The Utter Mine, at Coleda, has
“been closed for some time. The coal is fair lig-
“nite. It now belongs to Mr. I. C. Stump of San
“Francisco. The railroad passes it, and the coal
“may be dumped upon the cars on the track. The
“Southport mine, belonging to Mr. Simpson, has
“been closed down by arrangement with the Lun-
“ing estate management, which pays him a bounty
“for so doing. The Southport coal is superior to
“the Newport coal, and may be shipped either by
“rail or water. The Southern Pacific R. R. Co.
“has a mine at Utter City, which cannot be prof-
“itably worked, and the dumps and trestle on the
“slough are rotting. The Newport mine is dis-
“tant three to four miles from the shipping point,
“Coos Bay, near the railroad wharf, and is con-
“nected with deep water by a narrow gauge rail-
“road. It runs out on trestles to bunkers about
“1000 feet from the R. R. wharf. There are other
“abandoned mines near Marshfield, one of which
“belongs to the Poole estate. The seam in the
“Newport mine, which has been explored and
“worked for nearly forty years, is almost ex-
“hausted, and Coos Bay coal must soon come from
“some other deposit.

“ About ten miles from Marshfield, there is a
“valuable and extensive coal deposit, known as the
“Dunham mine. It is principally owned by E. B.
“Dean & Co., of San Francisco, but has not been
“developed. Mr. Dunham, who has, or had, an in-
“terest in the property, took out coal to run two
“steam engines and a small locomotive for three
“years while logging for Dean & Co., but since the
“timber has been removed, no coal has been taken
“out. I visited this mine and went into the work-
“ings. There are two seams, well defined, with a
“clay band of about twelve inches between them.
“They lie horizontal with an easterly dip, and are
“together between four and five feet thick. The
“surface croppings have been traced five miles.
“The coal presents a solid face some distance in the
“drive and appears to be a very superior quality of
“lignite. It has been tested on the steam schooner
““Emily” for steam purposes with good results.
“It has also been used by the Marshfield steam fire
“engine. This coal deposit lies adjacent to the
“railroad, which passes over the property. It can
“only be marketed to advantage by shipping on the
“railroad. The permanent way is now laid to this
“property.

“ The saw mills around Coos Bay are: Dean &
“Co.’s; The California Lumber Co.’s; Simpson’s;
“Southern Oregon Co.’s; Stave & Box Factory.
“There are several mills on Coquille river. There
“is also a salmon cannery on Coos Bay and another
“on Coquille River, while recently a creamery has

“been established on the Bay and another at Myrtle
“Point. Four or five small steamers find employ-
“ment on Coquille river, and seven or eight on Coos
“Bay and sloughs, two being tugs. This is the
“only means the people have of moving to and fro
“and transporting merchandise.

“ *Construction, etc.*

“ The railroad is graded to Coquille City, a dis-
“tance of seventeen and a half miles, with the ex-
“ception of two bridges across swamp or overflowed
“land. One bridge will be 1600 feet in length and
“the other 1630 feet. The piles for the first bridge
“are on the spot, ready for driving; the piles for
“the second bridge are also on hand, but must be
“transported on the cars. Ten miles of steel rails
“are now laid to Dunham’s coal mine from deep
“water at Marshfield, and the ties for the remain-
“ing seven and a half miles to Coquille City are
“on hand, except about 3,000 ties which will be
“required to complete the line. The timber for
“these ties is growing near the railroad track.
“There is also a half a mile of steel sidings laid.
“There are two and a half miles of steel rails on
“hand, and five miles of rails and fittings are
“needed to complete the road to Coquille City.

“ The track is substantially built. The bridges
“along the constructed division are apparently
“stronger than any wooden bridges on the Ore-
“gon division of the Southern Pacific railroad.

“Where the track abuts on the navigable slough,
“and is exposed to wash from the swell caused by
“wind or a passing steamer, it is faced with rock.
“The maximum grade is two per cent or 104 feet to
“the mile; the heaviest curve is eleven degrees, the
“the greater number running below eight degrees.

“ The railroad needs ballast. It is proposed
“to ballast with coal slack from Marshfield to the
“point where gravel is found in the cuttings. The
“slack is dumped down a chute to the railroad from
“the overhead trestle of the Newport or Luning
“mine.

“ A substantial wharf, 300 feet long, has been
“built at the railroad terminus. This wharf may
“be extended to 3,000 feet along the deep water
“line, as the railroad reserve of fifty acres, outside
“the corporate limits of Marshfield and therefore
“exempt from municipal taxes, gives this main
“frontage, plus 800 feet frontage on Coal Creek
“slough, which runs back to the old coal mine
“owned by the Poole estate. The Railroad Com-
“pany built a drawbridge across this slough under
“an act of Congress. There are two side tracks
“at the wharf, and engine and store houses. At
“the lower end of the wharf there is nineteen feet
“of water at high tide. The tidal rise and fall aver-
“ages four feet.

“ Before I left Marshfield, a working gang had
“started to line up and straighten the track; and
“an engineer’s party had started work to perma-

“Myrtle Point, a distance of nine miles. This
“would give to Myrtle Creek twenty-five miles of
“bonds, representing \$625,000. It is estimated
“that the road from Coquille City to Myrtle Point
“could be built and equipped for \$8,000 per mile.

“ *Right of Way and Subsidies.*

“ A local committee guaranteed the right of way
“from Marshfield to Roseburg up to \$17,000.
“About \$7,000 has been expended. There will be
“no difficulty with the right of way. Much of the
“line is located over Government land. At Rose-
“burg terminal facilities, to the extent of ten acres,
“close to the Southern Pacific depot, have been
“promised by the owner of the land.

“ The following subsidies have been promised
“and partially paid:

“Marshfield subsidy, payable when road

“ is built to Myrtle Point.....\$41,175.00

“Coquille City 12,500.00

“Myrtle Point 12,500.00

66

“ Total subsidy.....\$66,175.00

“Of which received 20,709.23

“ 25 per cent was due when the first ten miles
“was graded; \$16,250 paid. 20 per cent is due
“when the first ten miles are in operation; \$29,000
“will be paid when the second ten miles are in op-
“eration and \$6,775, the balance, on the six and a

“half remaining miles to Myrtle Point. Mr. Graham did not accept the Roseburg subsidy on the conditions proposed, but Messrs. Herman & Sheridan say the citizens will behave liberally to the road.

“ *Stock Certificates.*

“ The capital stock of the Coos Bay, Roseburg and Eastern Railroad Co. is represented by 40,000 shares of stock. The Company's stock book shows the following disposition of the certificates of stock:

“1891	Shares	Shares
“Apr. 28—Issued to O. J. Seeley..	19,994	
“ “ “—Cancelled		19,994
“ “ “—Issued to O. J. Seeley...	19,993	
“ “ “—Issued to T. R. Sheridan	1	
“ “ “—Issued to W. E. Baines.	1	
“ “ “—Issued to R. A. Graham.	1	
“ “ “—Issued to W. B. King..	1	
“1892		
“Jan. 9—Cancelled		1
“1891		
“Apr. 28—Issued to E. G. Flanagan	1	
“ Certificate in stock book.		
“ “ “—Issued to J. B. Bennett.	1	
“1892		
Jan. 9—Issued to J. B. Hassett..	1	
Certificate in stock book.		

“ The block of stock for 19,993 shares issued
“to P. J. Seeley, endorsed by him, is in the Rail-
“road Co.’s safe and was inspected by me. It is
“under the Company’s control and may be can-
“celled at any time. I also compared the stubs with
“the certificates entered in the stock register, and
“found them to correspond. The shares so issued
“were to qualify the directors under the laws of the
“State of Oregon. Practically there has been no
“stock issued.

“ *Organization, etc.*

“ The original incorporators of the company
“were:

“ J. W. Bennett, lawyer and banker, Marshfield.

“ E. G. Flanagan, banker.

“ T. R. Sheridan, merchant and banker, Rose-
“burg.

“ A. M. Crawford.

“ The company organized with the following
“directors: T. R. Sheridan, R. A. Graham, F. W.
“Burnett, O. J. Seeley, W. B. King, E. G. Flan-
“agan and W. E. Baines.

“ The first meeting of the board of directors was
“held August 19th, 1890, present the foregoing,
“except W. E. Baines, who is noted absent, in the
“minute book of the corporation, which was read
“by me.

“ At this meeting certain resolutions were passed
“and a contract entered into of which I append an
“extract which shows the legal status of R. A. Gra-
“ham towards the Coos Bay, Roseburg & Eastern
“Railroad and Navigation Co., and to which spe-
“cial reference is hereby made; I also append copies
“of certain legal documents, contracts and convey-
“ances, which further explain the position of the
“Corporation and R. A. Graham's relations there-
“to.

“ There is also appended a map of the Railroad
“addition to Marshfield, showing the railroad re-
“serve and the lots held in trust for the benefit of
“the railroad. An examination of the books of the
“Company show that sixty lots, 140 ft. by 25 ft.
“each, have been sold for \$6,500 cash. One lot sold
“for \$750 and the other for \$600. This sum is in-
“cluded in the receipts on account of subsidies.

“ The railroad addition to Marshfield is located
“on the only possible site for an extension of the
“town, and is mostly level swamp land reclaimed by
“levee. The old town occupies a spur of a steep
“hill, on the water front of which are the principal
“business street and private wharves. The land
“back of the straggling residences on the higher
“ground belongs to the Southern Oregon Co., and
“being covered by a blanket mortgage, cannot be
“sold. The railroad addition follows the plan of
“Coronado, San Diego Co., as to size of lots and
“width of streets.

“ Marshfield is well lighted by electricity. It is
“at the head of the navigation on Coos Bay, and
“must become a place of importance when the
“country is opened to settlement by railroad con-
“struction. It has about 2,000 inhabitants.

“ Empire City, situated five miles lower down
“the Bay, has ceased to be of much commercial im-
“portance. The timber in its vicinity has all been
“cut off and the mills located at or near it, have
“their logs rafted down to them. Water is also
“said to be scarce, whereas Marshfield is well sup-
“plied.

“ Owing to the inaccessibility of the country,
“hay, flour, etc., are imported from San Francisco,
“while farmers a few miles back have no means of
“bringing their produce to market.

“ *Harbor Improvements.*

“ I attach herewith extract from Captain Thos.
“W. Symon's report on the improvement of Coos
“Bay harbor, issued by the United States Govern-
“ment, 1891, showing their extent and importance.
“Capt. Symons is the United States engineer in
“charge of the works. I went down the harbor
“and saw the work already accomplished. A jetty
“of 4,000 feet has been built along the North spit,
“closing up one (the north) channel and confin-
“ing the water to the old or main channel. A depth
“of from eighteen to twenty-six feet at high water
“is now maintained on the bar. An extension of

“the jetty for about 3,000 ft. from its present west-
“erly face is contemplated, with the expectation
“and almost certainty of deepening the bar to
“thirty feet at high water. This would make Coos
“Bay the best harbor on the Coast between the
“Columbia River bar and San Diego, except San
“Francisco. Capt. Symons speaks of the great
“natural undeveloped resources of the country de-
“pendent upon Coos Bay for an outlet.

“ *General Conclusions.*

“ For the purposes of this report, the first ques-
“tion to be considered is whether the line of rail-
“road from Marshfield to Coquille City would
“probably pay working expenses and interest on
“bonds. When the permanent way is laid to Co-
“quille, a place of about 800 inhabitants, there will
“be an issue of 375 \$1000 bonds, representing
“\$375,000 at 6% interest, this involves the payment
“of \$22,500 per annum interest. The working
“expenses for one train daily each way and main-
“tenance gang along the line is estimated at \$30
“per day or \$180 per week of six working days,
“equal to \$9,360 per annum, without making al-
“lowance for depreciation of permanent way and
“rolling stock. The road must therefore earn
“\$31,860 a year between Marshfield and Coquille
“City, or \$612 weekly to pay interest and operat-
“ing expenses.

“ It is not possible to estimate with accuracy
“the probable traffic receipts upon this line be-

“cause the Coquille River is the route of exit from
“the valley as far up as Myrtle Point, while water
“communication is invariably used on the Coos
“Bay side and no record or tally of traffic has been
“kept. As already stated, the river traffic on the
“Coquille employs four or five little steamers,
“while the outbound trade with San Francisco em-
“ploys five or six small schooners, which carry lum-
“ber as well as farm produce. A good deal of the
“merchandise for Coquille and Myrtle Point is im-
“ported by way of Coos Bay. As the railroad
“would not be directly benefited by the existing
“lumber and coal trade from Coos Bay, it must
“depend upon the Coquille and Myrtle Point trade
“mainly, while it would undoubtedly develop con-
“siderable local traffic along the line from Marsh-
“field to Coquille, in the shape of coal, lumber and
“farm products.

“ I am inclined to think that the railroad would
“get nearly all the Coquille and certainly all the
“Myrtle Point traffic except lumber from the saw-
“mills on the river, which would continue to be
“shipped by schooners belonging to the mill own-
“ers. The steamers would collect the freight and
“carry passengers as at present, delivering them
“at the railroad depot in Coquille instead of at
“Bandon, at the mouth of the Coquille river as is
“now done.

“ As railroads develop traffic where built, it is
“fair to conclude that such would be the case with a

“railroad from Marshfield to Coquille. Indeed the
“elements for such development are unusually fa-
“vorable and abundant in this case. There is a
“very rich agricultural valley tributary to the road
“with vast resources in timber and coal that can
“only find a profitable outlet to the sea over the
“railroad. The extent of this development of
“course would depend upon the enterprise of the
“owners of the forest and mines. A great deal of
“the former I understand is on Government land.

“ From a careful consideration of existing con-
“ditions, and of probable and certain development,
“I should say that with energetic management, the
“railroad should develop sufficient business to pay
“fixed charges and working expenses. It would
“certainly carry all passengers.

“ The improvement of Coos Bay harbor is also
“another element in the case favorable to the rail-
“road project. But there can hardly be a doubt
“that were the road built to Myrtle Point it would
“pay fixed charges on \$625,000 bonded debt and
“operating expenses from the start. The latter
“would not be increased to any appreciable extent,
“except perhaps the employment of a line man on
“the additional nine miles of road.

“ As the railroad property now stands it is prac-
“tically valueless. If the road be opened to Co-
“quille City, and a vigorous policy be adopted to
“develop traffic, it would then be an available as-
“set and might be made to pay all charges.

“ Taking the project as a whole, I am clearly of
“opinion that a standard gauge railroad, on the
“route of the Coos Bay and Roseburg railroad pro-
“ject, would certainly pay if economically con-
“structed. It would open vast forest reserves,
“and a rich mineral country between Myrtle Point
“and Comas Valley, now wholly undeveloped, and
“afford a short and easy outlet to the sea coast at
“Marshfield on Coos Bay; while it would also give
“an outlet to the rich farming country of Douglas,
“Jackson and Josephine counties, which are now,
“to a great extent, cut off from a market. My
“remarks in my general outline of the situation will
“emphasize this point.

“ In my judgment it would not pay, however,
“to extent the line beyond Myrtle Point unless it
“were built right through to Roseburg. The in-
“tervening timber belt is without population, and
“there would be no object in stopping at any point
“in the valleys between the timber and Roseburg.
“The bonds which the Company is authorized to
“issue should be more than ample for construction
“and interest until the road began to earn money,
“because there is no engineering difficulty. The
“grade is easy and there are few bridges until the
“Umpqua river is reached. It must be bridged at
“Roseburg.

“ When built to Roseburg, the Southern Pa-
“cific R. R. Co. must either purchase or lease the
“Coos Bay & Roseburg railroad or lose all the

“traffic of the rich and populous farming country
“of the Umpqua and Rogue river valleys. While
“the road is only operated to Coquille or Myrtle
“Point the Southern Pacific interests would not be
“affected by it, because the distance, sixty-two
“miles, between Roseburg and Myrtle Point, is an
“effective barrier against the shipment of produce
“from the Umpqua and Rogue River territory and
“it would be restricted to local traffic. But with
“the line of the railroad completed from Marsh-
“field to Roseburg the conditions would be entire-
“ly changed and Roseburg would be within 97
“miles of a shipping port, and 386 miles nearer San
“Francisco than they now are by way of Portland,
“while the transportation charges would be pro-
“portionately less. The Southern Pacific Com-
“pany would therefore be compelled to absorb the
“road or suffer great diminution of traffic receipts.

“ ROBERT J. CREIGHTON.

“Messrs. J. D. Spreckels & Bros. Co.

“San Francisco, Cal.

“ Sept. 17th, 1892.”

(Witness continuing:) Subsequent to sending to me by J. D. Spreckels & Bros. Co. of the memorandum contract, Complainant's Exhibit 1, I had further conversation amplifying it, as to how the road was to be built, how far they were to finance it, and how they were to be paid. After this report of Mr. Creighton

came in, we had a meeting and it was agreed at that discussion that they should furnish the money at once—as fast as it was required to build the road to Myrtle Point; that we were to go on with the surveying of the road from Myrtle Point to Roseburg, and to do as much as could be done the following year, 1893. The meeting took place at Mr. Spreckels' office, San Francisco. Complainant's Exhibit 1 is not dated, but it was signed or sent to me in August or September of '92—August, I think.

Counsel for plaintiff shows witness telegram signed J. D. Spreckels & Bros. Co., dated September 15, 1892.

(Witness continuing:) On being shown a telegram signed J. D. Spreckels & Bros. Co., dated September 15, 1892, I state I received that telegram from them.

Counsel for plaintiff offers the telegram in evidence, which is admitted by the Court; marked: "Complainant's Exhibit No. 3, and is as follows:

“ Marshfield, Ogn., Sept. 15, 1892.

“San Francisco, Cal., Sept. 15, '92.

“To R. A. Graham.

“ Send us balance of bonds and stock. Will
“make advances on condition proposed.

“ J. S. SPRECKELS & BROS. CO.”

(Witness continuing:) The condition alluded to in that telegram was the same as this contract. Subsequent to the making of the contract, Complainant's Exhibit 1, a written contract was entered into between the Spreckels and myself modifying it.

(Counsel for plaintiff shows witness contract.)

(Witness continuing:) On being shown this contract I state that it is the contract to which I allude.

(Counsel for plaintiff offers the contract in evidence, which is admitted by the Court; marked Complainant's Exhibit No. 4, and is as follows:)

“ San Francisco, Sept. 13th, 1893.

“ In consideration of services rendered by
“Messrs. J. D. Spreckels & Bros. Co., I hereby
“agree to pay them a commission of 6% on proceeds
“of sale of bonds of the Coos Bay, Roseburg &
“Eastern Railroad & Navigation Company, after
“deducting cost of floating same. Said commis-
“sion to become due and payable as advances are
“made against the bonds; or, in lieu of this com-
“mission being paid in cash, J. D. Spreckels &
“Bros. Co. have the option of taking capital stock
“in the railroad company at the price of 20c per
“share.

“ And I hereby authorize Messrs. Spreckels to
“deduct from advances made against the bonds
“such sums as may from time to time be due them
“for commission as aforesaid.

“ This agreement cancels so much of agreement
“made Sept. 3d, 1892, as relates to 10% commis-
“mission for placing the bonds, and 10% commis-
“sion on any profit made in cost of construction.

“ R. A. GRAHAM.

“Approved, J. D. Spreckels & Bros. Co.

“ By F. S. Samuels, Acting Sec.”

(Witness continuing:) The agreement says to have the option of taking stock in the railroad company at twenty cents per share. That should be twenty per cent of par value. I had an agreement with J. D. Spreckels & Bros. Co. as to the time when they were to have refunded or repaid to them money which they advanced to the railroad. The agreement was that they should be reimbursed for their expenditures out of the proceeds of the sales of the bonds when sold. J. D. Spreckels & Bros. Co. were to have exclusive charge of the sale of the bonds. Pursuant to this agreement, I turned over to J. D. Spreckels & Bros. Co. all the bonds that we had at that time except five which had been pledged to other creditors prior to that time; ten thousand and one shares of stock of the railroad company; the subsidy list and an agreement to turn them over the real estate at Marshfield in the Railroad Addition as soon as we earned it, or when we got to Myrtle Point. By “earning it” I mean that under the terms by which we got it as subsidy for building the road we were not to get title to it completely until the road was completed to Myrtle Point. Meantime, and until we

reached Myrtle Point the title stood in the name of T. R. Sheridan of Roseburg, he was trustee for C. H. Merchant who owned the land and gave it to us. There was an understanding or right to sell any prior to the time we reached Myrtle Point. Under the agreement we had the right to sell any portion we liked or could sell of it at a valuation which as I remember was fixed about the current prices or what it was supposed to be worth; the only obligation the trustee had was he should know that the money received for the purchase of the land had gone into the construction of the railroad; then he should give a deed to anybody whom we instructed him to deed the land to as we having sold it. The railroad was completed to Myrtle Point in September, 1893. At the time that I completed the railroad to Myrtle Point I had put into that railroad of my own funds and resources about a hundred and eighty thousand dollars; of money that I had either furnished of my own or provided from sales of real estate and collection from subsidies. Regarding the Marshfield land, to which I have alluded, as soon as we got the road to Myrtle Point we authorized the trustee—I notified the trustee that I had made this arrangement with Mr. Spreckels and that he should deed the land over to them. At that time we had the estimate there of the value of that land at about two hundred thousand dollars. So that by the time I completed the road to Myrtle Point in 1893 I had turned over to J. D. Spreckels & Bros. Co. this land that was set out later on in the note, the ten thousand and one shares of stock and six hundred and twenty bonds of a thousand dol-

lars each. There were no more than 625 bonds ever issued on that roadbed during the time I had any connection with it. Up to that time J. D. Spreckels & Bros. Company had put into the financing the building of that road one hundred and seventy-five to a hundred and eighty thousand dollars; close to \$180,000.

Abut this time I had some negotiations with the defendant Southern Pacific Company. I started my negotiations with Mr. Towne, then manager of the Southern Pacific, and when he died Mr. Kruttschnitt took up the negotiations along where Mr. Towne had left them. I also had negotiations right along at the same time with Mr. Stubbs, who was traffic manager of the road. The argreement contemplated the building of the road to Roseburg.

(Counsel for plaintiff shows witness letter on letterhead of J. D. Spreckels & Bros. Company, purporting to have been signed by Mr. Samuels.)

(Witness continuing:) I received this letter on the letterhead of J. D. Spreckels & Bros. Company.

(Counsel for plaintiff shows witness telegram in the code of J. D. Spreckels & Bros. Company, the translation being on the face of the telegram.)

(Witness continuing:) On being shown telegram in the code of J. D. Spreckels & Bros. Company, I state I received that telegram and the translation is in accordance with the code which was jointly used by me and Mr. Spreckels.

(Counsel for plaintiff shows witness letter dated July 24, 1893, addressed to witness, and signed J. D. Spreckels & Bros. Co., F. S. Samuels.)

(Witness continuing:) Upon being shown letter dated July 24, 1893, addressed to me, and signed J. D. Spreckels & Bros. Co., F. S. Samuels I state I received that letter.

(Counsel for plaintiff shows witness letter on the letterhead of J. D. Spreckels & Bros. Co., dated May 22, 1894, signed J. D. Spreckels & Bros. Co., F. S. Samuels, Acting Secretary.)

(Witness continuing:) I received this letter from J. D. Spreckels & Bros. Co., dated May 22, 1894, signed J. D. Spreckels & Bros. Co., F. S. Samuels, Acting Secretary.

(Counsel for plaintiff offers in evidence, which are admitted by the Court, and maked the following documents:)

Letter April 24, 1893, Complainant's Exhibit 5.

Telegram, Complainant's Exhibit 6.

Letter July 24, 1893, Complainant's Exhibit 7.

Letter May 22, 1894, Complainant's Exhibit 8.

(Complainant's Exhibit 5 is as follows:)

“ San Francisco, April 24th, 1893.

“Mr. R. A. Graham,

“ Marshfield, Or.

“Dear Sir:

“ I am in receipt of your favor of April 20th
“from Roseburg. You will remember that our
“first arrangement with you for the Rails was that
“you were to pay us \$50,000 cash upon their ar-
“rival here from New York. The Rails arrived,
“you were not ready for operation, and we sold
“1400 tons of them. Later on about the middle
“of 1891, you took the rest of them; it was then
“understood that you were to give us your Note
“in payment for same, said Note to be endorsed,
“and that you were also to give us a majority of
“the stock and sufficient bonds of the Road to se-
“cure this Note. You were unable to give us the
“bonds at the time, because the Road had not been
“constructed far enough to obtain first issue. We
“thereafter provided you with funds to enable you
“to go on with the Road, and later on you carried
“out your agreement with us by placing the ma-
“jority of the stock, and all the bonds, with the ex-
“ception of three or four, which had been issued.

“ Will this testimony help you any? You state
“in your letter that you did not receive the Rails
“which were attached by Miller until January,
“1892, in which case those rails belonged to us, in

“common with the other stockholders of the Road,
 “because we were connected with your having pur-
 “chased them, as instead of taking cash from you
 “we took certain securities which enabled you to
 “use the money with which you purchased the Rails
 “from the Lower California Development Co.,
 “which money otherwise would have been due to
 “us.

“ Kindly let me know at once if this is the testi-
 “mony you wish. If so, telegraph, as a letter would
 “be too long enroute. Before a deposition was
 “taken, however, I would like to see Mr. Deering,
 “as he will probably advise us if this is the proper
 “testimony for you to get.

“ Very truly yours,

“ F. S. SAMUELS.”

(Complainant's Exhibit 6 is as follows:)

“ Marshfield, Og., July 24, 1893.

“Dated San Francisco, Cal., July 24, 93.

“To R. A. Graham,

“(Will not go farther than)

“ Finchase Myrtle Point

“(this winter) (money) (market is very bad)

“Wesshalbe Mangote Majarcis

“ J. D. SPRECKELS & BROS. CO.”

(Witness continuing:) The railroad was not projected beyond Myrtle Point at that time, from the time of its completion there because at that time it was not considered to be a good time to sell the bonds. We had made efforts through a house in London to sell them and the London house had not made any final arrangement. In addition, times had become very difficult through the failure of Behrings of London, which upset things generally. There never was any change or modifications in the understanding between me and Spreckels that they were to finance the road through to Roseburg, about the time of the completion of the road to Myrtle Point and prior to the signing of the note for five hundred and twenty-three thousand dollars.

(Complainant's Exhibit 7 is as follows:)

" San Francisco, Cal., July 24th, 1893.

"R. A. Graham, Esq.,

" Marshfield, Or.

"Dear Sir:

" We have had a long discussion over the question of the Road, and in view of the present condition of the world's finances, and the poor prospect ahead of placing the bonds for some time, we have come to the conclusion that we had better stop at Myrtle Point unless things improve, which we fear will not be this season. We trust, therefore, in anticipation of this course, that you will be able to reduce the expenses very materially.

“ How soon will you be able to send us notes,
“&c., on account of the subsidy due to Myrtle
“Point?

“ Mr. Payne has not yet made his report. Judg-
“ing from the amount of work that he appears to
“be putting onto it, it will be a very extensive one.
“As soon as we get it we will communicate its con-
“tents to you.

“ ‘*Arcata.*’ This steamer will probably sail to-
“morrow noon, with a large portion of the Rails,
“amounting to about 315 tons.

“ Very truly yours,

“ J. D. SPRECKELS & BROS. CO.

“ F. S. Samuels.”

(Witness continuing:) The Mr. Payne alluded to in this letter was Mr. Horne Payne, a member of the firm of Sperling & Co., bankers and brokers in London, who had come out to investigate the project with a view of disposing of the bonds. During our joint efforts to promote the railroad to Roseburg I went to London for the Spreckels to float those bonds. At that time when I went to London I had a letter of authority from the Spreckels Company. This is the one.

(Complainant's Exhibit 8 is as follows:)

" San Francisco, Cal., May 22, 1894.

"Messrs. Sperling & Co.,

" 8 Austin Friars, London, E. C.

"Dear Sirs:

" Mr. R. A. Graham has our authority to act
"in any manner which he may consider as best for
"our joint interests in the matter of the Coos Bay,
"Roseburg & Eastern Railway & Navigation Com-
"pany. You will please deliver to him, should he
"so require, all the papers and documents which
"you now hold relating to this.

" Yours faithfully,

" J. D. SPRECKELS & BROS. CO.

" F. S. Samuels."

(Witness continuing:) I was not able to accomplish anything in London.

At that time I had completed the road to Myrtle Point. I entered upon another endeavor in which J. D. Spreckels & Bros. Co. became jointly interested with me. In the winter of '93 and spring of '94 I had brought to my attention a coal property adjoining or adjacent to the Coos Bay Railroad, about three miles from the main line. After examining the property I got an English engineer by the name of Howarth to examine the property and make a report on it to see whether it was

likely to be a good coal property or not. After he had made his report, which was quite favorable, I then made a contract with the owner, Mr. John Norman, to get a working bond on this land; the total price of the 640 acres which he claimed to have was \$60,000. I took the bond to the land with the right to enter onto the property and cut timber, or develop the coal mine, or do anything that was necessary for the operation of it in full as a coal mine, agreeing to pay him so much a ton. My impression is now it was ten cents a ton royalty on the coal for what we took away, and fifty cents a thousand royalty on the timber for what we took away. Whatever purchase price we paid in the way of royalty on the timber and coal would eventually be credited to us on the purchase price of the land if we concluded the contract after we had investigated it. After we had made this arrangement with Mr. Norman we entered onto the coal tract; we started tunnels to develop the coal in the coal seams; started in construction of a spur track from the railroad track, at what was afterwards called the Junction, into the mine. As I remember it in August, '94, when the grading of these three miles was quite completed ready for the rails and a tunnel into the vein of coal had been driven about four or five hundred feet, I then put the matter up to Mr. Spreckels.

From Marshfield to Myrtle Point is twenty-seven odd miles. The Beaver Hill Coal Company is close to three miles, between two and a half and three miles from the junction of that branch railroad with the Coos Bay Railroad. I have been discussing the grading of the railroad from the Coos Bay Railroad to the Beaver

Hill Coal Mine. At the time I took the matter up with Mr. Spreckels the grading was almost complete. I had borne the expense of that grading; it cost me close on to thirty thousand dollars; thirty-one or thirty-two thousand dollars. Up to that time I had not had any negotiations with either of the Spreckels about this coal proposition; not up until the time I presented it. I took it up with the Spreckels in the summer of '94, I think August. At that time I had driven the tunnel in about three hundred feet into the vein. We had taken out coal as we went along in the vein; five, or six, or seven tons a day possibly. I took this matter up with Spreckels in San Francisco. I told them I wanted to borrow enough money of them to develop this mine. I represented to them that if it was the kind of a mine that we expected it would be, that it would produce a lot of freight for the railroad and thereby assist in paying off the expenses of the road as we went along. They did not take kindly to the idea of lending the money for the opening of the mine; but they said they would go up and examine it and see what, if anything, they wanted to do. Mr. A. B. Spreckels and Mr. Samuels came up the end of August or beginning of September, 1894, to Marshfield, Oregon, and they examined the mine. They went over the new projected road with me where we had graded from the junction in. It wasn't quite finished at that time. They looked into the coal mine as far as they could see with this tunnel and spent one day altogether in the neighborhood. We walked over the graded portion of the road-bed. After the completion of their examination, the next day they started for home. The next thing rela-

tive to this matter was I heard in a letter from Mr. Samuels within a few days after the time they left in which they said they would,—what was pressing us at that particular time was the want of rails to build into the mine over this grade, and I impressed them with the fact that whatever was done, the first thing to be done was to have the rails for this branch. The chief object in developing the Beaver Hill Coal Mine and connecting it with the Coos Bay Railroad was to make money as coal miners and get the freight for the railroad company. Subsequently, I should think eighty per cent of all of our business of the entire freight carrying capacity of the Coos Bay Railroad came from this Beaver Hill Mine. It subsequently developed from six to ten cars a day of twenty-five tons each in the way of freight for the railroad, making a total of about a hundred and fifty tons to two hundred tons, or two hundred and twenty-five tons. After Mr. Samuels had made the preliminary trip with Mr. Spreckels I heard from him by letter.

(Counsel for plaintiff shows witness letter.)

(Witness continuing:) That is the letter.

(Counsel for plaintiff offers letter in evidence, which is admitted by the Court; and marked: "Complainant's Exhibit No. 9;" and is as follows:

" San Francisco, Sept. 8, 1894.

"Dear Graham:

" I am very much of the opinion that the result
"of our trip is highly satisfactory and while I did

“not question A. B. very closely, I learned enough
“to know that he is pleased not only with the prop-
“erty, but with you, and I also feel *glad* that all
“around it has led to much better feeling—he did
“not return with me as he stopped at Sacramento
“but I told him we must send up the rails at once,
“and then when he gets to the city we will discuss
“the rest. Of course you will have to go on with
“the rest of the work, bunkers &c., and all I sug-
“gest is that you keep the expenses within the lowest
“possible margin.

“ You had better keep the Beaver Hill Coal &
“Timber Co. accounts entirely separate from those
“of the R. R. & open a set of books for it at once.
“When you get everything running in good shape
“to ensure early completion of the work, you had
“better come down,—I feel a greatly renewed con-
“fidence in the enterprise and you can count on me,
“pushing everything forward and I have already
“thought over plan for marketing the coal. Tell
“Mrs. Graham to speak to the Captain of the
“‘*Arago*’ about Miss Lewis who I expect will go
“up on her next trip, that is following the present
“one. It would probably be a good idea not to
“renew contract with Goodall, as I think we can
“bring them to our own terms.

“ With hearty thanks for your & Mrs. Graham’s
“kind attention and congratulation on the outlook.

“ I remain,

“ Yours truly,

“ F. S. SAMUELS.”

(Witness continuing:) As a result of these negotiations there were discussions had been the Spreckels Bros. and myself relative to their entrance upon this proposition. They took place in San Francisco. Spreckels made the proposals. When I came down later in the autumn to see what permanent arrangements could be made Mr. Samuels said to me that the Spreckels people did not want to lend any money purely for the opening and development of the mine, but they wanted an interest in the mine. That instead of lending me the money to develop the mine, if I would turn over the contract I had for the purchase of the land from Norman to a company to be formed, they would organize a company and develop the mine; that they would lend that coal company all the money that was required for the opening and development and maintaining of the mine, and they would give me half of the stock of the mining company; that they would not charge the amount of money used in the development of the mine to me, nor would I be in any way responsible for the return of it to them; they would charge it to the coal company which was to be known as the Beaver Hill Coal Company. When the coal company paid out to J. D. Spreckels & Bros. Co. all the money advanced for operating and developing this mine, then the stock that was to be allotted to me at that time would be delivered to me. Subsequently and pursuant to these negotiations a written contract was entered into between myself and the Spreckels company for the formation of this corporation.

(Counsel for plaintiff offers contract in evidence, which is admitted by the Court; marked: "Complainant's Exhibit No. 10;" and is as follows:

" THIS AGREEMENT, made and entered
"into this 20th day of December, 1894, at the City
"and County of San Francisco, State of California,
"by and between ROBERT A. GRAHAM, of
"Marshfield, Coos County, State of Oregon, the
"party of the first part, and J. D. SPRECKELS
"& BROTHERS COMPANY, a corporation
"created and existing under the laws of said State,
"and having its principal place of business in said
"City and County, the party of the second part,

" WITNESSETH:—

" That Whereas, John Norman and his wife,
"Dora Norman, have agreed to convey to the party
"of the first part, for the sum of Seventy Thousand
"Dollars, certain coal lands situated in Coos County,
"Oregon, by certain Articles of Agreement dated
"16th of February, 1893, which have been extended
"from time to time and are now in full force and
"effect.

" And Whereas, the party of the second part is
"desirous of acquiring a half interest in said coal
"lands with said party of the first part under said
"Agreement, and for such half interest is willing to
"advance the money necessary, as hereinafter pro-
"vided, to pay the said Seventy Thousand Dollars
"as in said Agreement and extensions is provided,

“if said money is not realized from sale of coal or
“timber taken from said lands, as the installments
“of said \$70,000 become due.

“ Now, therefore, in consideration of the fore-
“going, and of the mutual promises herein con-
“tained, and of other valuable considerations, the
“party of the first part hereby grants, sells, assigns,
“transfers, and conveys unto the party of the sec-
“ond part all the right, title and interest of said
“first party in and to said Agreement and the lands,
“rights and privileges thereunder, to be held as
“hereafter provided.

“ The party of the second part hereby agrees to
“advance the money necessary to open, develop,
“operate and maintain said property, and to pay the
“installments of purchase money called for by said
“Agreement, as and when said installments become
“due and payable, and the royalties:

“ PROVIDED, HOWEVER, that such
“money is not to be furnished by the party of the
“second part if sufficient money to pay the same is
“realized from sale of coal or timber taken from
“said land.

“ It is further agreed that the parties hereto
“shall proceed forthwith to develop and work the
“coal mines on the lands embraced in the said
“Agreement, and to sell the coal and timber there-
“from, and that from the proceeds of said sales,
“are to be first paid the royalties due said John

“Norman and Dora Norman under said agree-
“ment, and the installments of purchase money, as
“the same become due, and the expenses incurred
“in opening and operating the property. Any
“sums thereafter realized from the sale of timber
“and coal are to be applied toward the liquidation
“of interest on any indebtedness existing between
“the parties hereto; after said interest has been
“liquidated, the surplus, if any remaining, together
“with the lands, rights and privileges in the said
“Norman Agreement conveyed and created is and
“are to be equally divided between and belong to
“the parties hereto, share and share alike, but the
“share in the surplus so due to the party of the
“first part shall be retained by party of the second
“part as payment on account of any indebtedness
“whatsoever of party of the first part to party of
“the second part, until the same shall be fully paid.

“ It is further agreed that the parties hereto are
“to share equally in the benefits of any reduction
“of price for said coal and timber lands, whether
“said reduction be by way of commission allowed
“to said party of the first part on placing the Agree-
“ment, or otherwise.

“ It is further agreed that the rate of interest
“shall be six per cent (6%) per annum on all funds
“furnished by party of the second part under this
“Agreement, and said interest to be charged to
“operating expense account.

“ It is also agreed that a Company shall be in-
 “corporated under the laws of the State of———
 “to be known as the ‘Beaver Hill Coal Company,’
 “and that the entire capital stock of said Company
 “is to be held and owned by parties of the second
 “part until such time as has been hereinbefore pro-
 “vided, that the surplus profits exceeded the sum
 “necessary for the liquidation of interest, and any
 “indebtedness of party of first part to parties of the
 “second part has been canceled; then one-half of
 “the capital stock shall thereupon become the prop-
 “erty of the party of the first part and is to be
 “transferred to the party of the first part or to his
 “assigns.

“ IN WITNESS WHEREOF, the parties
 “hereto have affixed their signatures and seals in
 “duplicate, the day and year first above mentioned,
 “the party of the second part causing its name to
 “be signed and its seal to be affixed by its officers
 “thereunto duly authorized.

“ R. A. GRAHAM.

“ J. D. SPRECKELS & BROS. CO.

“ A. B. SPRECKELS,

“ Vice President.

“Witness

“ F. O. Deering to T. A.

“ Graham’s signature.

“Fredk. S. Samuels.

(SEAL).”

(Witness continuing:) Pursuant to that agreement the Beaver Hill Coal Company was formed as a corporation; the preliminary meetings were held in San Francisco; I think I didn't attend any preliminary meetings. I did attend the first organization meeting after the incorporation. Mr. J. D. Spreckels and Mr. A. B. Spreckels, Mr. Samuels, Mr. Hugg and myself became stockholders and directors. Mr. Hugg and Mr. Samuels were in the office of J. D. Spreckels & Bros. Co. Twenty-five hundred shares were issued to me. The company was incorporated for 5,000 shares at \$100 each, making a total capitalization of \$500,000. I never took the shares out of the office. There were handed to me, and I think they were endorsed on the back, I am not sure.

At the time we made this preliminary agreement with Mr. Spreckels, at the time of the incorporation of the Beaver Hill Coal Company, I had expended on the Beaver Hill plant, spur about ten thousand dollars. I had expended the money clearing land adjacent to where we were going to do our improvements, and driving the tunnel into the coal vein. I had expended on grading of the roadbed over thirty thousand dollars. That makes a total of forty thousand dollars. In my agreement with J. D. Spreckels & Bros. Co. credit was allowed to me with the Coos Bay Railway Co. for some of that expenditure. I think just over forty thousand dollars; whatever we claimed, was allowed. There was no credit given to me on the books of the Coos Bay Railway for any portion of that; on the books of Spreckels, I should have said. There was an understanding as to

credit I was to receive from Spreckels on the railroad accounts. I think just over forty thousand dollars.

(Counsel for plaintiff offers in evidence certificate of stock, which is admitted by the Court; which is as follows:)

“No. 5. Number of shares, 2500.

“To Whom R. A. Graham.

“Date May 15, 1895.

“ Received the above certificate subject to the
“articles of incorporation and by-laws of the com-
“pany. R. A. Graham.

“Date of Cancellation April 28, 1898.

“Cancelled by issue of No. 6 and 7.

“No. 5 2500 shares.

“ San Francisco, May 15, 1895.

“ Beaver Hill Coal Company.

“ This certifies that R. A. Graham is entitled to
“2500 shares of Beaver Hill Coal Company trans-
“ferrable on the books of the company by endorse-
“ment hereon and surrender of this certificate.

“ FRED S. SAMUELS, Secretary.

“ A. B. SPRECKELS, President.

“Incorporation March 22, 1895.

“ And endorsed: ‘R. A. Graham, no sale. F. S.
“Samuels, Secretary.’”

The signature, R. A. Graham, immediately following the printed matter "Received the above certificate subject to the articles of incorporation and by-laws of the company, R. A. Graham" is my handwriting. The signature, R. A. Graham, on the back of the certificate, is also my handwriting. I never gave my consent to the cancellation of this certificate of stock issued to me, which certificate of stock is marked on the stub, "Date of cancellation, April 28, 1898. Cancelled by numbers 6 and 7." I did not know it had been cancelled at the time stated here.

(Counsel for plaintiff offers in evidence the two succeeding numbers 6 and 7, which are shown on the stub of certificate 5, issued to the plaintiff, as having been responsible for the cancellation of this certificate.)

MR. DUNNE: What do you mean by that word responsible? That the shares represented by that first certificate were later measured into these two succeeding certificates?

Mr. McNAB: Exactly, Mr. Dunne.

(No. 6 is as follows:)

"Issued for number 5.

"Number of certificate 6.

"Number of shares, 2490.

"By whom, R. A. Graham.

"To whom, A. B. Spreckels.

"Date, April 28, 1898.

"Received the above certificate subject to the
"articles of incorporation and by-laws of the com-
"pany. A. B. Spreckels.

“Date of cancellation, June 8, 1899.

“Cancelled by issue of (See No. 8).”

“ On the face:

“No. 6 2490 shares.

“ San Francisco, April 28, 1898.

“ Beaver Hill Coal Company.

“ This certifies that A. B. Spreckels is entitled to
“2490 shares of Beaver Hill Coal Company trans-
“ferrable on the books of the company by endorse-
“ment thereof and surrender of the certificate.

“ FRED S. SAMUELS, Secretary.

“ A. B. SPRECKELS, President.

“Endorsed: “A. B. Spreckels, no sale, F. S.
“Samuels, Secretary.”

(Witness continuing:) I never transferred or knew that there had been transferred two thousand four hundred and ninety shares that were originally issued to me, to A. B. Spreckels. I never gave my consent to this transfer.

(Counsel for plaintiff offers certificate No. 7, which was admitted by the Court; and is as follows:)

“Number of certificate, 7.

“Number of shares, 10.

“By whom, R. A. Graham.

“To whom, W. D. K. Gibson.

“Date, April 28, 1898.

“ Received the above certificate subject to articles of incorporation and by-laws of the company.

“W. D. K. Gibson.

“Date of cancellation, June 8, 1899.

“Cancelled by issue of (See No. 8).”

“ On the face of certificates:”

“No. 7. 10 shares.

“ San Francisco, April 28, 1898.

“Beaver Hill Coal Company.

“ This certifies that W. D. K. Gibson is entitled to 10 shares of the Beaver Hill Coal Company, transferrable on the books of the company by endorsement thereon and surrender of this certificate.

“ FRED S. SAMUELS, Secretary.

“ A. B. SPRECKELS, President.

“Endorsed on the back: “W. D. K. Gibson, no sale, Fred S. Samuels, Secretary.”

(Witness continuing:) I never gave my consent to the transfer of ten shares of the original issue of two thousand five hundred shares to me, to W. D. K. Gibson. I did not know on June 8, 1899 that it had been so transferred.

MR. McNAB: Without reading them into the record, gentlemen, I would ask you to admit that certificate No. 1 was issued for 1240 shares to A. B. Spreckels on May 15, 1895, and that it was endorsed,

"Date of cancellation, June 8, 1899.

"Cancelled by issue of (See No. 8)."

" On the face:

"No. 6 2490 shares.

" San Francisco, April 28, 1898.

" Beaver Hill Coal Company.

" This certifies that A. B. Spreckels is entitled to
"2490 shares of Beaver Hill Coal Company trans-
"ferrable on the books of the company by endorse-
"ment thereof and surrender of the certificate.

" FRED S. SAMUELS, Secretary.

" A. B. SPRECKELS, President.

"Endorsed: "A. B. Spreckels, no sale, F. S.
"Samuels, Secretary."

(Witness continuing:) I never transferred or knew that there had been transferred two thousand four hundred and ninety shares that were originally issued to me, to A. B. Spreckels. I never gave my consent to this transfer.

(Counsel for plaintiff offers certificate No. 7, which was admitted by the Court; and is as follows:)

"Number of certificate, 7.

"Number of shares, 10.

"By whom, R. A. Graham.

"To whom, W. D. K. Gibson.

"Date, April 28, 1898.

“ Received the above certificate subject to articles of incorporation and by-laws of the company.
“W. D. K. Gibson.

“Date of cancellation, June 8, 1899.

“Cancelled by issue of (See No. 8).”

“ On the face of certificates:”

“No. 7. 10 shares.

“ San Francisco, April 28, 1898.

“Beaver Hill Coal Company.

“ This certifies that W. D. K. Gibson is entitled
“to 10 shares of the Beaver Hill Coal Company,
“transferrable on the books of the company by endorsement thereon and surrender of this certificate.

“ FRED S. SAMUELS, Secretary.

“ A. B. SPRECKELS, President.

“Endorsed on the back: “W. D. K. Gibson, no
“sale, Fred S. Samuels, Secretary.”

(Witness continuing:) I never gave my consent to the transfer of ten shares of the original issue of two thousand five hundred shares to me, to W. D. K. Gibson. I did not know on June 8, 1899 that it had been so transferred.

MR. McNAB: Without reading them into the record, gentlemen, I would ask you to admit that certificate No. 1 was issued for 1240 shares to A. B. Spreckels on May 15, 1895, and that it was endorsed,

"A. B. Spreckels, no sale." That No. 2 for 1240 shares was issued to John D. Spreckels on May 15, 1895, endorsed: "John D. Spreckels, no sale. F. S. Samuels, Secretary." That on the same day, May 15, 1895, certificate No. 3 was issued for ten shares to F. S. Samuels, and that the same was endorsed: "F. S. Samuels, no sale." That on the same day, May 15, 1895, certificate No. 4 was issued for ten shares to Charles A. Hugg, and was endorsed: "Charles A. Hugg, no sale. Fred S. Samuels, Secretary."

MR. HOHFELD: Yes, we admit it.

(Witness continuing:) I attended the meeting on May 15, 1895. I attended subsequent meetings of the Beaver Hill Coal Company from time to time. Of the directors who were named in that company, I understood Mr. C. A. Hugg was the Secretary of J. D. Spreckels & Bros. Company and that Mr. Samuels was the director and Assistant Secretary. At the preliminary meeting there was no agreement entered into between me and the company or anybody relative to my salary. At or about the time of the creation of this company I had an understanding or agreement with Spreckels & Company relative to who should manage the mine. I had that understanding or agreement with John D. Spreckels, Mr. A. B. Spreckels, and with Mr. Samuels. It took place in their office in San Francisco. The contract between us was that at the transferring of this property and the organization of this company it was understood that I should be manager of this company with headquarters at Marshfield, and have

charge of the affairs for their mining and other business connected with the company; that they should be the agents down in San Francisco, and have the charge of the coal sales. In compliance with that I was elected a director and manager of the company at the first meeting they had. Prior to the meeting and between the preliminary arrangements,—all the time from the opening of the mine,—I was acting manager of the company and did continue to be. It was first discussed that I should be the manager of the company during the time the preliminary arrangement was being made, when the money was provided. That was part of the agreement between us as to my delivering over the option. I certainly would not have delivered over the option and consented to the surrender of this option unless I had been the manager. I think the date of the preliminary meeting was May 10th, or 15th. It was in May, of '95, as I remember it that a resolution was passed relative to my appointment as manager; or about that time. It was the first regular meeting of the Beaver Hill Coal Company.

(Counsel for plaintiff offers in evidence a portion of the Minutes of the Beaver Hill Coal Company, of date, May 10, 1895, to be found on page 14 of the Minutes; which were admitted by the Court; and are as follows:)

“ On motion of Charles A. Hugg, duly seconded,
“it was resolved that Mr. R. A. Graham be and he
“hereby is authorized to act for the company in the
“State of Oregon and in and about the conduct of

“the mining and timber property purchased from
“A. B. Spreckels with powers to employ and dis-
“charge men, purchase materials, implements and
“supplies, and to sell coal within the State of Ore-
“gon; also under the direction of the president of
“the company to do such other acts and things as
“he may be specially directed and authorized to do.”

(Witness continuing:) That is the resolution to which I refer. The conversation with the firm relative to my salary as manager came up about February, 1896. I discussed the matter first with Mr. Samuels, at Marshfield. He was up there looking over the mining situation and in a discussion in our office in the evening a question came up about expenses and salaries. I said to him that I wasn't getting any salary; that my fixed charges was about five thousand dollars a year; that some twenty-nine hundred, nearly three thousand dollars of that five thousand went to pay life insurance policies which I was carrying, two policies of fifty thousand dollars each in the New York Life Insurance Company; that I needed a hundred and fifty dollars a month in addition to these life insurance expenses for the maintenance of the house for myself and my wife, which he agreed with me was quite proper. He agreed to take the matter up with his people in San Francisco, with Mr. Spreckels. Soon after he got home, he wrote me a letter about the lines discussed.

(Counsel for plaintiff shows witness a letter of date February 21, 1896.)

(Witness continuing:) On being shown this letter I state that that is the letter to which I refer.

(Counsel for plaintiff offers the letter of date February 21, 1896, in evidence, which is admitted by the Court; marked "Complainant's Exhibit No. 11," and which is as follows:)

" Feb. 21st, 1896.

"R. A. Graham, Esq.,

" Marshfield, Oregon.

"Dear Sir:

" The writer has just had a conversation with
"Mr. A. B. Spreckels in reference to the talk be-
"tween us regarding salary and insurance policies,
"and it will be perfectly agreeable to him to accept
"the proposition which you made—i. e., to allow you
"\$150.00 per month cash, also a sum sufficient to
"pay the premiums on insurance policy of \$50,000
"in favor of your wife, and if you will send us the
"other insurance policy, duly endorsed to ourselves,
"we will keep the premiums on the same paid up,
"it being understood that this latter policy is to
"be payable to us in the event of your death, but
"if it matures during your life time it is for your
"account.

" Yours faithfully,

" F. S. SAMUELS."

(Witness continuing:) There were two insurance policies each of fifty thousand dollars in the New York

Life, both bearing the same date, which I had previously taken out. I think they bore the date of January, 1894. The aggregate premiums of the policies annually was \$1,475 each; the annual premium on each policy of fifty thousand dollars. The policy matured. I received the money. I am now litigating with J. D. Spreckels & Bros. Company in the Federal Court in San Francisco in regard to this policy. It was a policy which matured at the expiration of a prescribed period. It matured the 14th day of January, 1914. Upon the receipt of that letter I received a monthly salary of one hundred and fifty dollars. Premiums were paid by J. D. Spreckels Company on the policies referred to; they paid the one they agreed to pay and they furnished me with the money to pay the balance, during the year '95-'96, and they gave me my salary as manager during the year '97, but I never got the money from them or from the Beaver Hill Coal Company to pay the premium on the policy that was kept by me for the year '97, which policy was payable on the 14th day of January as I remember, or in January, for 1898—in advance. There were two policies; the other policy I had to let go, because I did not have the money to pay it with, to keep the premium up. The policy that is now in contention is the other policy that is mentioned in this letter. It is provided in that agreement on the payment of \$2950.00 that the policy may be delivered to me. That sum for the premiums was not due by me at that time. At this time, at the inception of the Beaver Hill Coal Company, I had invested in these properties, in the Coos Bay Railroad and in the spur track and mine—of my own funds two

hundred and forty thousand odd dollars, I should think, about two hundred and forty thousand dollars. In addition to that, I had contributed in the lands,—the value of that land we always considered up to that time worth about two hundred thousand dollars. Up to this time J. D. Spreckels & Bros. Company had contributed to the general enterprises, up to the time of the Norman option, December, 1894, I haven't got that data exactly, but somewhere in the vicinity of two hundred thousand dollars. At the time of the inception of the agreement, or at the time of the organization of the Beaver Hill Coal Company when we were discussing the matter of arrangements, there was an understanding between me and Spreckels relative to the length of time that I should remain as manager of the property; as long as we retained the company, I supposed I was going to be manager. There was no limit placed on the time that I should remain. Up to this time I did not have any financial agent or person with whom I did financing or business other than J. D. Spreckels & Bros. Company. From this time on, from the time of the creation of the Beaver Hill Coal Company the expenditures of J. D. Spreckels & Bros. Company increased, for the reason that they furnished a good deal of money for the development of the mine and they furnished a good deal more money for the betterments of the railroad that was made necessary in consequence of the mine. We had to have rolling stock; we had to have dump cars to carry coal from the mine to Marshfield; we had to have more yard room at Marshfield; we had to have a bunker to bring the cars and the boats

together at the bay for shipments of the coal and we had to have a bunker at the mine for the assembly of the coal from the mining cars to make it ready for shipment into the railroad cars. We took up a few light rails on a place called the Summit and put on some heavier rails there; we had to do a lot of work in the yard, and we had to build a machine ship. At the time I took the option on the Norman land, which subsequently became the property of the Beaver Hill Coal Company the acreage included in that option was one section, 640 acres. The entire acreage did not pass to J. D. Spreckels, and subsequently to the Beaver Hill Coal Company, because there was one-quarter section that Norman did not have title to. We did not know it until after the organization of the Beaver Hill Coal Company. As I understand it there was a deduction of twenty-five per cent made to Mr. Spreckels on that account. Twenty-five per cent from the purchase price. I will explain what became of that released 160 acres. That 160 acres at the time that we supposed we bought from Norman and Norman sold it to us in this contract belonged to the United States government, and there was a squatter on it by the name of Norton who was a handy man for Norman. And it was Norton who showed us over the lands in the original purchase of it, and described to us that "this is Section 17, and this is so much of Section 19; this is the Norman tract." It was in the timber and I was not able to discern lines very closely in the heavy timber. I took his word for it, that he was selling us the land that he was showing, which was the property described; but later we found

out that Norton was actually living on this quarter section and was making an application at that time to the United States government for a patent to the land as a homestead; that the quarter section that he did really sell us, that he didn't tell us he was selling us, was a quarter section not adjacent to the three-quarter sections that was in 17; it was in 19. Therefore, when we found out we notified Norman and I brought the matter before Mr. Spreckels and we took the necessary steps to relieve ourselves from the purchase from Norman. The fact relative to the failure of title to this quarter section was a matter of discussion between me and Mr. Spreckels. A reduction was made in the price. Regarding the released quarter section, we put in an application to the government for it. I had Mr. T. R. Sheridan; first I suggested to Mr. Spreckels that he make an application to the government for this land as a coal mine and he didn't care much for it. He said we better get someone else or suggested that I might make it. I didn't think I could make it. I got Mr. T. R. Sheridan, president of the railroad company, to make application for it, not as a homestead, under the law we had to pay twenty dollars an acre for it, but we had to prove before we could purchase it that it was more valuable for coal than anything else. Mr. T. R. Sheridan subsequently acquired this 160 acres. Subsequently we organized a company called the Beaver Coal Company, Mr. Sheridan and I. Mr. Spreckels did not have anything to do with that company. That mine or claim was provincially known there as the Klondike mine. That is over on the top spur. Spreckels

Bros. were fully informed of all the facts and given an opportunity to purchase it. In the neighborhood of the spur for the Beaver Hill spur to this Klondike mine it was commonly known as the Klondike spur. I built it from my own funds. I furnished some of the money, and borrowed some. I did not borrow any from the Spreckels. Regarding increased expenditures of the Beaver Hill Coal Company mine by the Spreckels, on the road, etc., I could not say how much was expended on improvements on the railroad looking forward to carrying the increased traffic furnished by the Beaver Hill mine, but there was expended enough to bring indebtedness up from commencement of the line, from approximately two hundred thousand dollars to five hundred and twenty-three thousand dollars, at the giving of this note, less forty-four thousand dollars which is a separate note from the outside, which was embodied in this big note, so that the increase would probably be perhaps two hundred and seventy-five thousand dollars. After the organization of the Beaver Hill Coal Company, as manager, I proceeded to open it up as big as possible. We built a yard outside for handling of produce; built another tunnel to get the rock, to get the coal out from the head slope; we drove a slope down several hundred feet; we dug gangways off and dug chutes, and proceeded to take out the coal; put in heavy machinery for its development. In the preliminary operations I had the assistance of an expert, Mr. Howarth; and we had a mining engineer, Mr. J. L. Parker. Mr. Parker remained with us I think about eighteen months. It was under his direction that most of this work took

place under me as manager. During this period of time ensuing and up to October, 1896, the relations between me and J. D. Spreckels & Bros. Company were very good. After Parker left, I hired a superintendent by the name of Campbell; later some discussion was had between the Messrs. Spreckels and myself about having a regular superintendent to look after the mining operation which was getting along very well. In response to the suggestion that they should have a mining superintendent I said that I didn't think we needed any—we would not need to go to the expense of a mining superintendent; that we had some very good men there now that understood the property, and I thought we could get along very well with them. I think I wrote to them; I received a letter in reply.

About this time a change came over the relations between me and J. D. Spreckels and Bros. Company; along in possibly '97, the Summer of '97, there appeared to be a good deal of friction about the methods of operating the coal mine. They represented to me in the beginning that they were not getting enough coal. They thought that they wanted more coal out and we had the coal in sight and they wanted it taken out in methods that was not considered by engineer Parker, who opened up our mine and who we were all in line with for the first year, was the proper way. Parker's idea was to work the mine, because of the bad formation of the ground, back into the property, to the extreme edge of our property with the gangway, driving our airways and chutes and then when we got to the back end of the property to take the coal out and let the coal fall

in behind—let the roof fall in behind if it wanted to. They suggested a policy contrary. They wanted the coal taken out in rooms where you would get the coal as you went along instead of passing it in gangways. They would take it out and leave the ordinary pillars that you would leave in a mine that had a good formation. We thought that would be very detrimental to the mine, because we thought if we had—and where we did do it, the mine was bad; the roof would heave and the floor would squeeze up and we couldn't keep it timbered. At the time they began to make the objections and demand more coal we were producing from the Beaver Hill mine per day 100 tons lump coal and a very considerable quantity, I should think thirty-five or forty per cent more, of screenings, nut and pea coal that came through. The nut and pea coal was being marketed mostly at Coos Bay to steamers that came in there; all the lump coal was shipped to San Francisco. As a result of this dispute in policy a man by the name of Chandler was sent to the mine by J. D. Spreckels & Bros. Company. On his first trip there I think he remained two weeks. He examined the land and went back and made a report on it. After his trip and report Mr. Chandler made a second trip. The first trip was made I think in August or September. I am able to refresh my memory with regard to the time of that visit by referring to my diary. I keep a diary. I don't know just how long I have been in the habit of keeping a diary. I have now diaries since 1893 up to 1900, and I used to keep it before that. I have that diary with me. By referring to my diary I can ascertain the

time of the second visit of Mr. Chandler; the first and second visit of Mr. Chandler to the mine and the length of time he remained. My memorandum shows that he arrived in Marshfield on Saturday, the 28th of August, 1897, for his first trip. I have here that he left on Thursday, September 23rd. This memorandum in my diary is a memorandum which I made at the time and on the same day that these instances occurred; in the evening of the same day. The same fact is also true of any incident to which I will refer to in the future with regard to my diary. The memorandum in my diary of the date of his arrival is as follows (witness reading):

“ Saturday, the 28th of August, 1897: ‘Around
“the office all day. Chandler came up to look over
“the mine.’ The date that I have marked here as
“his departure; ‘Went out to the mine in the morn-
“ing; Chandler went home overland. Stopped at
“the mine all day and all night. ‘The fire is going’
“—and I can’t make it out—in the mine, and we
“will drive a tunnel around it.’ ”

That was the memorandum of that day. The Mr. Chandler referred to is the man who subsequently succeeded me as manager of the mine. He is the same Mr. Chandler who was appointed receiver in a suit brought by J. D. Spreckels & Bros. Company of the railroad. At the time that Mr. Chandler came there I received a letter from Mr. Spreckels, announcing his coming.

(Counsel for plaintiff shows witness letter.)

(Witness continuing:) Upon being shown this letter I state that that is the letter I received.

(Counsel for plaintiff shows witness what purports to be a letter of introduction.)

(Witness continuing:) Upon being shown this letter I state that I received this letter also. The letter dated August 23, 1897, which purports to be a letter of introduction of Mr. Chandler from John D. Spreckels was delivered, as I understand it. At the time that these letters were brought to me by Mr. Chandler I did not have any intimation that Mr. Chandler was to succeed me as manager of the mine.

(Counsel for plaintiff offered in evidence, which was admitted by the Court letters of date August 23rd, marked: "Complainant's Exhibit 12" letter of introduction marked: "Complainant's Exhibit 13;" which are as follows:

" COMPLAINANT'S EXHIBIT 12.

" 'San Francisco, Cal. Aug. 23rd, 1897.

"R. A. Graham, Esq.,

" Marshfield, Oregon.

"Dear Sir:

" In view of the delay attending my projected
"visit, I have decided to send Mr. Chandler up to
"you, to report on the mine, and consult with you
"in reference to projected improvements and pre-
"sent workings. Kindly place all facilities at his

“disposal, and, commending him to your courtesy
“during his stay.

“ I remain,

“ Yours truly,

“ JOHN D. SPRECKELS.

“ COMPLAINANT’S EXHIBIT 13.

“ San Francisco, Cal. Aug. 23rd, 1897.

“R. A. Graham, Esq.,

“ Marshfield, Oregon.

“Dear Sir:

“ This will introduce to you Mr. W. S. Chandler,
“re whom I have advised you under date of August
“23rd. Kindly let Mr. Chandler examine the mine
“and explain to him the nature of improvements
“proposed.

“ Yours very truly,

“ JOHN D. SPRECKELS.”

(Witness continuing:) I had no warning or intimation that Mr. Chandler was to succeed me. The projected improvements alluded to in the letter were improvements which we proposed to develop what turned out to be the Klondike mine afterwards, driving a slope there and develop and open up that property. It was Diamond drill work for which we had obtained a Diamond drill just recently on some adjacent property which we had recently acquired by getting a bond on it, and I think those were the only projected ones. At that time there was discussions between us relative to

the necessity of acquiring adjacent lands within which the ledges would dip. I brought it out. It didn't result in any particular friction, at the time, but we did not go on through with the policy suggested. The policy that I suggested was that there was a big tract of land adjacent to ours known as the Chadwick tract, consisting of almost 7000 acres. There was another piece of land in front of our land that the vein was dipping down on, known as the Merchant tract, consisting of 720 acres; those were the two pieces we proposed to acquire, because in the Chadwick tract the vein we was operating through out tunnels was running over and carrying us into the Chadwick tract before we reached this quarter section known as the Klondike mine, and the other side of that was running so that the vein as soon as we crossed over the swamp would go in the Chadwick land again, and we were developing mines on our own land this side of the swamp, and on the other tract, because our vein was dipping into it. If we had gone on it would have been on the other tract. When I say "we" I mean the Beaver Hill Coal Company. In addition to that we wanted the Merchant land because we had seen earlier. I had brought it to the attention of the Beaver Hill Coal Company earlier in the proceedings, that we needed the Merchant land for the purpose of having a better place to build miners' houses and get room to turn around. It was with their permission that I opened the Merchant land, but with the understanding that I should not bond it or buy it at that time, obligating the Beaver Hill Coal Company, but that I could take it in my own name and hold it for the Beaver Hill Coal

Company until such time as the Beaver Hill Coal Company saw fit to acquire it. They never saw fit to acquire it; but we did build a lot of houses on it pursuant to the arrangement, and many of the houses that the Beaver Hill Coal Company occupied was on this Merchant tract which did not belong to the Beaver Hill Coal Company. It was at the insistence of Mr. Parker, the mining engineer that we should take in the claims towards which the ledge was dipping. They were acquired. Mr. Chandler came back the second trip on October 16th, Saturday. I have a memorandum:

“At the time, Chandler came in at noon. Payday
“at the mine.”

At the time he arrived on his second trip I did not have any information or warning that he was to succeed me as manager. The purported reasons advanced by J. D. Spreckels & Bros. Company for his visit on this second trip was to watch the operation of the Diamond drill.

(Counsel for plaintiff shows witness letter dated October 11, 1897.)

(Witness continuing:) Upon being shown letter dated October 11, 1897, I state that I received that from Spreckels about that time. Mr. Chandler departed on Sunday, October 31, 1897. I have in my diary:

“ Left Marshfield at seven A. M. for San Francisco with Chandler. Got to Coons that night.”

That is the name of a stopping place at Comas Valley. The entry of October 31st is:

“ Left Marshfield at seven A. M. for Frisco
“with Chandler. Got to Coons that night.”

The entry on the 16th is:

“ At the mines. Chandler got in at noon. Pay-
“day at the mine.”

It was my custom to make those entries on the night of the day. I followed that custom in the case of these two entries I just read.

(Counsel for plaintiff offers in evidence a letter dated October 11, 1897, which is admitted by the Court; marked: “Complainant’s Exhibit No. 14;” and is as follows:

“ San Francisco, Cal., Oct. 11th, 1897.

“R. A. Graham, Esq.,

“ Manager Beaver Hill Coal Co.,

“ Marshfield, Or.

“Dear Sir:

“ In view of the importance of the Diamond
“Drill work, and its bearing on future questions, I
“am particularly desirous that Mr. Chandler should
“be present during the work, not as being in au-
“thority, unless you so desire it, but as an onlooker,
“with access to the borings. I had intended to leave
“the question until you arrived here, but as you
“are delayed, and the boring still continues, and
“will shortly reach the coal, I thought it best to send
“him up at once. Please see that he has suitable
“quarters to live in.

“ Yours truly,

“ A. B. SPRECKELS.”

(Witness continuing:) At the time of the arrival of Mr. Chandler on his second trip the only discussion I had with Mr. Spreckels was relative to the Diamond drill. From the next conference that I had with J. D. Spreckels & Bros. Company, after the visit of Mr. Chandler, from that time on until the first of November, 1897, the affairs between me and Mr. Spreckels grew decidedly worse. My diary says that I left with Mr. Chandler to go to San Francisco on October 31st. I went at the request of Mr. Spreckels to have a talk. At the time I left Marshfield I had no warning as to what the talk was to be about. I arrived in San Francisco on the 3rd of November, 1897. I had no warning given me as to the reasons why I was wanted at San Francisco. I called upon Mr. Spreckels at his office, the same afternoon I got in town, November 3rd. I had an interview with Mr. Spreckels at that time, it lasted an hour and a half or so. I have in my diary that I interviewed Mr. Spreckels at four o'clock in the afternoon. This is what took place at the interview: As I remember it he put this note up to me and said he wanted it signed. I said to him:

“ This is a departure, is it not, from our present
“policy that we are working under?”

He said:

“ I don't know that it is any departure.”

Well, I said:

“ We are operating now under a contract where-
“by you agree to furnish the money to build from
“Marshfield—to build this road from Marshfield

“to Roseburg and by mutual consent and to my
“serious disadvantage for the last two years I have
“allowed that contract to stand in abeyance for
“your convenience until this money can be raised in
“England or any place else, and now you are ask-
“ing me to close the contract up with a note bear-
“ing six per cent interest payable in a year, in-
“terest payable every month.”

And I says:

“ You know very well that this railroad never
“earned enough money in a month to pay its op-
“erating expenses and pay three thousand dollars
“to you for interest, and can’t do it.”

I say:

“ Furthermore, it has become quite evident and
“quite clear in the last few weeks from the cor-
“respondence that I have and from things that I
“have heard that you intend to fire me as manager
“of this coal mine, and thereby cut off my salary,
“what little income I have got from that, and that
“you intend to put in a man up there by the name
“of Chandler, whom I don’t think knows any more
“about running a coal mine than I do and not
“quite so much, probably, and I objected to his
“going into it, but I will join you if you want to
“put in a good man who will represent us all
“properly. But if you don’t do that, I am not
“going to agree to the proposition, because I don’t
“know what will come next, and I am not going
“to tie myself up or put a halter around my neck
“with this kind of a note.”

He says to me:

“ Are you done?”

I says:

“ Yes.”

Well, he says:

“ You are doing a whole lot of talking without
“quite having any excuse for talking.”

He says:

“ We haven’t got any desire to change the
“management of the mine. We don’t intend to.”

He says:

“ It is true you have got a contract whereby we
“have made some,—given you some encouragement
“that we would build this road out to Roseburg, but
“this note don’t cancel the contract. This note
“simply closes up the contract,—the deal that we
“have on now, and closes up our accounts and
“changes the situation only from a book account
“to a note where we are getting interest.”

He says:

“ This is required of us by my father who wants
“this thing closed up at this time.”

I says:

“ Does he want the contract cancelled whereby
“you won’t build the road to Roseburg or furnish
“the money?”

He says:

“ No; there hasn't been anything said about it.”

I says:

“ How about paying this interest? How do you
“think I am going to get the money every month?”

Well, he says:

“ You know we have been dealing with one an-
“other for three or four years; we haven't had any
“trouble about money. We think our conduct has
“been such that you have no right to be suspicious
“of what we are going to do. We therefore think
“you have got no right to ask us or to imagine
“that we are going to force you to pay this interest
“every thirty days simply because the note says
“so.”

I says:

“ How about the note when it—comes due? You
“have been,” I says, “some two years endeavoring
“to sell the bonds on this railroad. We have
“worked together with the Southern Pacific, with
“the English company who you brought out to
“examine this property and sell the bonds, and
“between the both of us we have not succeeded in
“selling one bond yet. Now you expect me within
“ a year to get in and sell those bonds sufficient to
“get you your money for this railroad.”

I says:

“ I can't do it.”

Well, he says:

“ You can have as much time as you want to

“sell the bonds and pay the note, and it won’t be
“forced upon you to pay this interest once every
“month and you will not be disturbed in the op-
“eration of the mine, and the income that you have
“got from the salary of the mine will not be in-
“terfered with.”

Therefore I signed the note. Relative to an extension of the time of payment of the note I said that I wouldn’t agree to it unless I had at least two Summers, to work on, which meant an extension of time of probably six months to a year. There were other offers or inducements held out to me by Mr. Spreckels in that conversation prior to my signing the note. Prior to signing the note and after we had agreed upon all the preliminaries of time and other things I said to him:

“ Now you are closing up this account and you
“are designating a lot of securities here that you
“are holding out and that I am required to leave
“with you, and among other things that you haven’t
“added here neither the Beaver Hill Coal Company
“stock nor the life insurance policies which you are
“holding. Am I going to get these back now?”

He hesitated a little while and says:

“ What is your opinion of it?”

“ My opinion is that I don’t owe you anything
“for giving this note except what this note design-
“ates; therefore I want my insurance policy re-
“turned to me and I want these Beaver Hill Coal
“Company securities returned or given to me.”

He says:

“ Well, I will do that.”

I says:

“ All right, you get them.”

He said they were in the safe; they were locked up and he would get them and return them to me at Marshfield. He also agreed to send me a copy of this note to Marshfield, which he did. I made a memorandum at that time in my diary relative to this conversation. That evening after our discussion we parted pleasantly; we went up to the Palace Hotel together. Everything was very pleasant. This note which I have in my hand is dated November 1st. It was already when I went into the office, dated November 1st, all drawn up. He didn't have to draw it up; he had it there and he pushed it out. That was on November 3rd. He shoved this note before me not more than a minute after I entered his office. The note was already prepared. The memorandum in my diary of that date is:

“ Arrived in San Francisco at eight thirty A.
“M. Met A. B. S. at four.” A. B. S. means A. B. Spreckels; the way I wrote it down.

“ At four and talked an hour. Had a very satisfactory meeting. Signed the railroad note for “one year to be extended six months if desired; “they to send me Beaver Hill stock.” Marked B. H. Not written out Beaver Hill. Marked: “B. H. stock and insurance policy to me at Marshfield.”

(Counsel for plaintiff offered in evidence the note, which was admitted by the Court; marked: "Complainant's Exhibit No. 15;" and is as follows:

"\$523,162.52 San Francisco, November 1, 1897.

" One year after date, without grace, I promise
"to pay to the order of J. D. Spreckels & Bros.
"Company, at their office in this city, the sum of
"Five hundred and twenty-three thousand one
"hundred and sixty-two dollars and fifty-two cents,
"payable in United States Gold Coin, with interest
"thereon in like Gold Coin, from date until paid,
"at the rate of six (6%) per cent per annum, in-
"terest payable monthly.

"

R. A. GRAHAM.

" And as collateral security for the payment of
"the above note and the interest to grow due there-
"on, I have deposited with the J. D. Spreckels &
"Bros. Company, the following property, to-wit:

" Certificate No. 10—10,001 shares of the capital
"stock of the Coos Bay, Roseburg & Eastern Rail-
"road and Navigation Company.

" Bonds of the Coos Bay, Roseburg & Eastern
R. R. & Nav. Co. as follows:

" 48	\$1,000 bonds	1 to 48 inclusive
" 25	1,000 bonds	54 to 78 inclusive
" 47	1,000 bonds	79 to 125 inclusive
" 125	1,000 bonds	126 to 250 inclusive
" 125	1,000 bonds	251 to 375 inclusive
" 250	1,000 bonds	376 to 625 inclusive
"		
" 620	Total.	

“ Deed to the following property:

“ All of blocks numbered One (1), Two (2),
“Six (6), Eight (8), Sixteen (16), Twenty-one
“(21), Twenty-eight (28), Thirty-three (33),
“Thirty-four (34), Thirty-five (35), Thirty-six
“(36), Thirty-seven (37), Forty-six (46), Forty-
“seven (47), Forty-eight (48), Forty-nine (49),
“Fifty-two (52), Fifty-three (53), Fifty-four
“(54), Fifty-seven (57), Fifty-nine (59), Sixty-
“three (63), Sixty-six (66), Sixty-seven (67),
“Seventy (70), Seventy-one (71), Seventy-five
“(75), Seventy-seven (77), Eighty (80), Eighty-
“one (81), Eighty-four (84), Eighty-five (85), also
“Block lettered “C,” also Lots One (1) and Two
“(2), and lots Eight (8) to Forty (40) inclusive,
“in block numbered Fifty-six (56) in “Railroad
“Addition to Marshfield,” according to the plat
“of said addition made by G. H. Spencer and duly
“recorded in the office of the County Clerk of said
“Coos County.

“ And should the said note or any part thereof,
“of the interest to grow due thereon, remain due and
“unpaid after the same should have been paid, ac-
“cording to the tenor of said note, I hereby irre-
“vocably authorize and empower said J. D. Sprec-
“kels & Bros. Company, or their assigns, to sell and
“dispose of the above described property or any
“part thereof, at public or private sale, with or
“without previous notice to me of any such sale,
“and from the proceeds arising therefrom to pay

“the principal, interest, charges, and the costs of
“sale, and the balance, if any, to pay over to me or
“my representatives, upon demand. In case of de-
“terioration of any of the above securities, or fall
“in the market value of the same, I hereby promise
“and agree to reduce the amount of said note, or to
“increase the security in proportion to such de-
“terioration or decrease of value, in default of
“which this note shall be considered due under the
“above stipulation. On the payment of the above
“note, interest and charges, according to the terms
“thereof, this agreement shall be void, and the above
“described securities returned to me.

“ R. A. GRAHAM.”

MR. McNAB: Counsel has offered a copy of the note which they say was prepared by their stenographer, and I accept it with the understanding that should comparison develop a difference it may be corrected.

MR. DUNN: Certainly.

(Witness continuing:) I next saw Mr. A. B. Spreckels after leaving him at his office on the evening of November 3rd, the next morning, at his office with his brother John D. Spreckels. I went to their office at 2:30 in the afternoon. My diary says with reference to that meeting:

“ Around the office all day; met A. B. Spreckels
“at two thirty in a conference about the Beaver
“Hill affair, and had a very unpleasant meeting;
“nothing but storms. He demanded cancellation
“of the contract and my resignation.”

By reference to my diary it refreshes my memory as to the details of the conversation. I will state it:

“ Mr. A. B. Spreckels said that he wanted me
“to resign as manager of the Beaver Hill Coal
“Company. I said to him:

“ Well, it didn’t take you very long to change
“your mind from last night when you didn’t want
“me to resign.”

He said that didn’t make any difference,

“ I have talked to my brother and we have de-
“cided that as we are the only ones that have any
“money in the property, that we are going to man-
“age it in our own way.” I said:

“ You will probably destroy it anyway.” He
“says: That is not any of your business; we shall
“manage it in our own way. If we can get our
“money out of it, we will get it out. If we can’t
“we are not holding you responsible for any por-
“tion of the money.” I says: I think I have got
“a pretty valid consideration in it. I brought that
“mine here to your office. I put you into it and
“I have a pretty good notion of the value of the
“mine and I don’t think I will let you spoil it.
“Besides that if you want to spoil it or shut it
“down or do anything of that kind, which I think
“you would do.” I said: “If you couldn’t spoil
“it you would probably shut it down, in your pres-
“ent state of mind, in order to freeze me out and
“get the railroad. If you don’t do either of these

“things, then I wouldn’t give you the management
“of it.”

We did not get very much further because he didn’t like to be talked to in that kind of a way and we ended our discussion without getting any place. I think it was Mr. John D. Spreckels put in the idea or suggested that:

“ Where is this going to stop? We have spent
“a lot of money up there, perhaps half a million
“dollars. How much more money do you want
“to develop the mine and do as you say, put it on a
“paying basis.” I says:

“ I have not come prepared to make any esti-
“mate this morning, but I will in the course of a
“day or two.”

I agreed to come back in the afternoon and give them an estimate of what I wanted to complete the mine and what I would do; and I saw Mr. Spreckels again the next day; Mr. A. B. Spreckels. My next interview was on Monday the eighth of November. At the previous interview which I have just mentioned with A. B. Spreckels there does not appear to be any discussion about the mine. I met him and rode down to the Palace Hotel in the carriage with him. His father was very sick and we discussed the question of his father’s sickness. My next interview with him relative to these business affairs was on Monday, November 8, 1897. I have in my diary:

“ Met A. B. Spreckels while at breakfast and
“arranged to go to his office at ten thirty. Met
“him and John together and had a pleasant meet-
“ing. Agreed on a policy for one year as follows:
“They to give me sixty-five thousand dollars and
“the proceeds of the stock and the management one
“year.”

That took place at the interview at 10:30 in the morning. At that interview there was a conversation relative to this agreement about the sixty-five thousand dollars. When we agreed upon that policy they said to me:

“ Now you go and get Mr. Deering. You will
“put that in writing, make an agreement?” I said:

“ Yes.”

“ And we will cancel the agreement whereby
“we agreed to furnish an unlimited number of dol-
“lars for the operation and maintenance of the
“mine; if we give you this further sum of sixty-five
“thousand dollars and return the proceeds of the
“stock to you and let you manage the property
“for one year, will that end our investment up there
“in case it ain’t a success?” I said yes. He says:

“ Will you have that put in writing?” I said:

“ Yes.” He says:

“ Well you have Mr. Deering draw that up.”

Mr. Deering was attorney for the Beaver Hill Coal Company.

Mr. Spreckels says:

“ You have Mr. Deering draw that up and we
“will sign it and that will end the whole thing.”

I went to Mr. Deering's office to get it drawn up. I explained as near as I could the details of the agreement as I remembered it. Mr. Deering drew it up on one page of ordinary foolscap in duplicate, and I signed it. I read it and looked it over. I was quite busy and Mr. Deering took that down to Mr. John Spreckels and Mr. A. B. Spreckels' office that same afternoon. Mr. Deering came back to me with a message from Mr. Spreckels. I knew that Mr. A. B. Spreckels was going out of town because he told me he was. Mr. Deering reported to me that Mr. John D. Spreckels had read the agreement and said to him: “That is all right. That is just what we agreed upon and that Graham could sign it or his brother would sign it as soon as he got back from Salinas, in the course of a day or two.” It was understood by them and me together in the office that day when we made this agreement that I was going home that night on the steamer “Arcada,” because there was good facilities for going. I signed the agreement. Mr. Deering says to me: “Mr. Spreckels says you sign the agreement and leave it here and he will have it signed when his brother comes back, and you can go home tonight,” which I did. I went home the next night. It took me three or four days to get to Marshfield. My diary says, at least my memorandum here says:

“ Around town until night; left at six on the
“Arcada. Met Deering through the day and
“signed agreement with Spreckels drawn up.”

I arrived at Marshfield Friday, 12th, '97. My
diary entry is:

“ Arrived home at nine A. M. not feeling good.
“Got telegram from A. B. Spreckels to return to
“the City at once, but I can't do it. Worked in
“the office part of the day.”

(An adjournment was here taken until tomorrow,
Tuesday, April 18, 1916, at 10 o'clock.)

TUESDAY, APRIL 18, 1916, 10 A. M.

(Direct examination of R. A. GRAHAM re-
sumed.)

(Counsel for plaintiff shows witnesses three tele-
grams addressed to witness from J. D. Spreckels &
Bros. Company.)

(The Witness:) After being shown these tele-
grams, which apparently are the original ones, I state
that I received them. The letter seems to be a copy.
I remember receiving a letter of similar nature, but I
don't remember how the copy was made. It is my be-
lief that the translation written on the face of this code
telegram is the correct translation according to the code
that was used between Mr. Spreckels and myself.

(Counsel for plaintiff offers in evidence this correspondence, which is admitted by the Court, and marked: "Complainant's Exhibits 16, 17, 18 and 19"; which are as follows:

(Exhibit 16.)

" The Western Union Telegraph Company

"Received at Md. Octo 9th, '97.

" San Francisco, Cal. Octo 9th, '97.

"R. A. Graham

" About what day weltlied arrive.

" A. B. SPRECKELS."

" (Translation: About what day will you arrive.)"

(Exhibit 17.)

" The Western Union Telegraph Company

" San Francisco, Cal. 9/30, '97.

"R. A. Graham.

" Come down weidlich.

" A. B. SPRECKELS."

" (Translation: Come down next week.)"

(Exhibit 18.)

"J. D. Spreckels & Bros. Company.

" San Francisco, Cal., Oct. 23rd, 1897.

"R. A. Graham, Esq.,

" Marshfield, Oregon.

"Dear Sir:

" We are in receipt of yours of Oct. 20.

“ *Riverton Mines.* The coal that has been
 “brought here from that locality has not been sat-
 “isfactory at all. You will remember that Staf-
 “ford bought some of the coal, put it into our
 “bunkers, and it all slacked into screenings. Fur-
 “thermore, there is a good deal of dirt mixed with
 “it, and we could not mix it with our Beaver Hill
 “Coal without injuring our coal; and it would not
 “do to sell it separately, otherwise there would be
 “eternal complaints that the poorest coal was be-
 “ing supplied instead of Beaver Hill.

“ Mr. A. B. Spreckels desires me to say that
 “he has been expecting you down here for some
 “time.

Yours faithfully,

“J. D. SPRECKLES & BROS. COMPANY.

F. S. Samuels,

Acting Secretary.

(Exhibit 19.)

“ The Western Union Telegraph Company
 “Received at Md. Octo 27th, 97. San Francisco,
 “ Octo 27th 97.

“R. A. Graham.

“ Heredais siture charpente down.

“ A. B. SPRECKELS.”

“ (Translation: How soon will you come
 “down?)”

(Witness continuing:) It was in response to
 these telegrams which have just been read that I went

to San Francisco, which meeting resulted in the making of the note dated November 1, 1897, which was actually signed on November 3, 1897. When I alluded to "Riverton Coal" I meant that it was a little mine down on the Coquille River, quite close to Bandon, that was opened up by some miners and they wanted to sell us their coal. They wanted us to handle their coal, and they were desirous of delivering it to us at the railroad at Cedar Point, a point of the river, and I referred the matter to J. D. Spreckels & Bros. Company. After I returned to Marshfield, Oregon, after having signed this note, dated November 1, 1897, and had the succeeding conversation leading to the contracts which I have related, of \$65,000. I did not receive from Spreckels Bros. & Company that contract providing for the payment of \$65,000 to finance that mine for the next year, and leave me as manager for a year. I reached Marshfield on the 12th of November. Upon my arrival I found telegrams awaiting me from Spreckels.

(Counsel for plaintiff shows witness telegram.)

(Witness continuing:) Upon being shown this telegram I state that that is the telegram. I also believe that the translation opposite the code words is correctly made. That telegram was in Marshfield when I got there.

(Counsel for plaintiff offers the telegram in evidence, which is admitted by the Court, marked "Complainant's Exhibit No. 20," which is as follows:

“ The Western Union Telegraph Company

“Received at Marshfield, Ogn. 11/11, '97.

“ San Francisco, Cal., 11/11, '97.

“R. A. Graham.

“ Necesidad that Board directors Beaver Hill

“caudice company harministe special malvezaron

“at office on company tarjando Thursday oregiren

“orillaron president.

“ F. S. SAMUELS, Secy.”

“ (Translation: I give you notice that Board

“directors Beaver Hill Coal Company will hold

“special meeting at office of company 3:00 P. M.

“Thursday, Nov. 18, by order of president.)”

(Witness continuing:) A few days after I received a letter from F. S. Samuels, dated November 11, 1897.

(Counsel for plaintiff shows witness letter from F. S. Samuels, dated November 11, 1897.)

(Witness continuing:) Upon being shown the letter dated November 11, 1897, I state that that is the letter I recieved.

(Counsel for plaintiff shows witness a telegram.)

(Witness continuing:) Upon being shown this telegram I state that I also received it.

(Counsel for plaintiff offers documents in evidence, which are admitted by the Court; the letter is marked: “Complainant’s Exhibit No. 21”; the telegram is

marked: "Complainant's Exhibit No. 22." The documents are as follows:

(Complainant's Exhibit No. 21.)

"J. D. SPRECKELS & BROS. COMPANY.

" San Francisco, Cal., Nov. 11th, 1897.

"R. A. Graham, Esq.,

" Director Beaver Hill Coal Company.

"Dear Sir:

" You are hereby notified that the President of
"this Corporation has called a special meeting of
"the Board of Directors of said Corporation, to
"be held at the office of the corporation, No. 327
"Market Street, in the City and County of San
"Francisco, State of California, upon Thursday
"the 18th day of November, 1897, at three o'clock
"P. M. You will please take notice of such meet-
"ing.

" Yours truly,

" FRED'K. S. SAMUELS,

" Secy. Beaver Hill Coal Co."

(Complainant's Exhibit No. 22.)

" The Western Union Telegraph Company.

"Received at Md. Nov. 27th 97. San Francisco,

" Cal. Nov. 27th 97.

"R. A. Graham.

" Malvaisie Friday decenso.

" A. B. SPRECKELS."

" (Translation: Meeting postponed to Friday,

"Dec. 3rd.)"

(Witness continuing:) I did not attend the meeting in response to that telegram and letter. Prior to my leaving San Francisco, and in the conversation which I had relative to leaving this memorandum contract with Mr. Deering I did not have any notice or warning at any time that there was to be a special meeting held. There was no intimation whatever to me that they were to hold a meeting for any purpose. At the time I left for Marshfield it was the understanding that I was to remain for the ensuing year as manager of the Beaver Hill Coal Company, and there was to be advanced to me sixty-five thousand dollars to finance the mine for that time. I did not attend the meeting because the weather was very bad; the roads were very bad from Marshfield to Roseburg; there was only one steamer running and it was quite difficult to get out. I had a very rough trip up, and I was feeling quite ill. My wife was sick and I wrote to them and told them that I could not come at that time, reiterated, as I remember, in the latter that evidently Samuels has gotten his work in, and has changed the conditions that existed when I left San Francisco, and that I would not go down at that time, but if they put the meeting off I probably might go down later. I didn't write only one letter at that time, until after I had gotten a telegram from them stating the meeting had been put off until December 3rd. When I got that letter I had changed my mind and I wrote them later and told them that I would not attend the meeting; that they evidently intended to change the management, and fire me, and if that was their intention, they could go ahead and do

it. It was a conciliatory letter, it certainly wasn't stormy. I told them I didn't want to get into any controversy; that I felt I hadn't been very well treated in the latter end, but that our business relations had been very pleasant up to quite recently, and I didn't want any litigation. The situation that then confronted me in my relations with the Beaver Hill Coal Company and the Coos Bay Railroad, that is the effect of the change of management with regard to the furnishing of freight for the railroad, was a very vital point. I will explain it: I felt that I had a contract with the Beaver Hill Coal Company whereby I had half the stock of the Company, and a contract with them to finance the construction of the mines—the opening and development and maintenance of the mine. I had an idea, because I was very well advised, that I could enforce the contract, but I didn't want to. I thought it would be inadvisable to stop there and have a fight over the interpretation, because it would shut the mine down. The Spreckels Brothers had the only steamer that was carrying coal from there—the Czarina. They threatened to take that off and send it to Alaska, which was quite a prosperous section of the country for shipping just at that time. They had control of the selling of our coal in San Francisco. They had the distribution agency there, through a man by the name of Stafford, and I concluded at the time that I could not go on running the mine without their assistance, and they threatened they would not put up another cent of money. And therefore I said: “Well, in the interest of everybody, it is better for me to quit

and let them have the management of it and furnish coal and freight to this railroad, because without the mine running the railroad was a very bad thing to sit up with. It wouldn't pay. I did not attend the meeting of December 3, 1897.

(Counsel for plaintiff offers in evidence the Minutes of the Board of Directors of the Beaver Hill Coal Company, dated December 3, 1897, which are as follows:)

“ The adjourned special meeting of the Board
“of Directors Beaver Hill Coal Company, held
“Friday, December 3, 1897, at 3 P. M. The fol-
“lowing named directors present: A. B. Spreckles,
“Charles A. Hugg, Fred S. Samuel. The meet-
“ing was called to order by A. B. Spreckels, Pres-
“ident. The president then stated that the ob-
“ject of this meeting was to elect a new manager
“of the company, the present manager, Mr. R. A.
“Graham having expressed the desire to be re-
“lieved from duty.”

(Witness continuing:) I never expressed any desire to be relieved from duty, unless they might have construed from that letter that I was willing to let them have the management.

(Counsel for plaintiff read in evidence the following from the Minutes of the Board of Directors of the Beaver Hill Coal Company:)

“ On motion of Charles S. Hugg, duly seconded,
“the following resolution was adopted:

“ ‘Resolved, That the resolution passed on the
“tenth day of May, 1895, by the directors of this
“company, by which Mr. R. A. Graham was au-
“thorized to act for this company in the State of
“Oregon, in and about the conduct of the mining
“and timber properties purchased from Mr. A. B.
“Spreckels, with power to employ and discharge
“men, purchase material, implements and supplies,
“and to sell coal within the State of Oregon under
“the direction of the president of this company,
“and to do such other acts and things as he may
“be specially directed and authorized to do, be and
“the same is hereby rescinded, and, it is hereby
“further

“ ‘Resolved, That W. S. Chandler be, and he
“is hereby authorized to act for the company in the
“State of Oregon, in and about the conduct of the
“mining and timber property purchased from Mr.
“A. B. Spreckels, with power to employ and dis-
“charge men, purchase material, implements and
“supplies, and to sell coal within the State of Ore-
“gon under the direction of the president of the
“company, and to do such other acts and things
“as he may be specially directed and authorized to
“do. And the said W. S. Chandler is hereby di-
“rected to proceed to the Beaver Hill Coal Com-
“pany and take possession of all the property of the
“company in the State of Oregon, and to hold pos-
“session of the same for this company, and R. A.
“Graham is hereby authorized and directed to de-
“liver and surrender to said W. S. Chandler the

“immediate possession of all assets and properties
“of any and every kind and nature whatsoever be-
“longing to this company in the State of Oregon.”

“ There being no further business before the
“meeting, on motion, duly seconded, the meeting
“adjourned.

“ Fred S. Samuels, Secy.

“ BEAVER HILL COAL COMPANY.”

(Witness continuing:) Mr. Chandler appeared upon the scene a very short time after December 3rd, which is the time of the meeting which the Minutes you have read refer to. I should think he appeared upon the scene in about eight or ten days. It was the same Mr. Chandler who had visited the mine twice before. Upon his arrival I turned over to him the possession of the mine. I took him up and introduced him to the foreman and to the people in charge up around the mine; told them that he was the manager, and to take orders from him. I did not throw any obstructions of any kind in his way. He came to our house to live, at my invitation. After I introduced Mr. Chandler at the mine, early in the month of January I left there and I think I came to Portland. Went from Portland to San Francisco; got there about the middle of the month. I can tell from my diary when I left and arrived in San Francisco. I left on Monday, the 27th, 1897, left Marshfield. I am reading from my diary:

“ Monday, December 27, 1897, left Marshfield
“in the morning at ten, on the hand car for Myrtle

"Point. Arrived there at 1:15. Had lunch at "Stahan's. Went to Fetters on horseback."

I have the date here in my diary when I arrived in San Francisco on that trip. It was Thursday, December 30, 1897. I will refresh my memory by reference to the diary about that trip. I went to their offices. I have memorandum here which says I gave them a check. I will read it:

" Arrived in San Francisco in the morning.
"Changed clothes, and went down town. Was in
"Spreckels' office and gave them a check for De-
"cember interest, twenty-six hundred dollars."

That interest was the December interest on the note dated November 1st of the same year; a month old. On that trip I have no recollection of meeting anybody in the office except Mr. Gibson, the Treasurer. It is my impression that I delivered the check to him. Upon leaving San Francisco I went to Portland. On January 13, 1898, I returned to San Francisco from Portland. On the trip of January 13, 1898, I met Mr. A. B. Spreckels at the Palace Hotel and I had a conversation with him relative to the Beaver Hill and other matters. The substance of the conversation was: I was going east to see what Mr. Huntington would do. He says: "Well, what is your prospect, do you think, of closing that deal up now this winter?" I says: "I think it doubtful of closing it this winter, but I think I can close it in the spring probably." He says: "Things are in very bad shape at the mine. We are hearing very bad reports from there." I says: "Where

did you get your reports?" He says: "We have sent a man up there, and we think things are in bad shape, and we want you to turn us over the management of that railroad." I says: "I won't do that. I won't turn you over the management of the railroad." He says: "If you don't turn it over, it will be worse for you." I says: "Why?" He says: "Well, we will shut the mine down." I says: "I expected you would do that. The way that this thing is being shaped for the last thirty days, it looked to me like that is just about where you are going to land." He says: "What objection have you to giving up the railroad and letting us operate it for the benefit of everybody? You haven't enough money to run it and keep it going and we are not going to operate any further as long as you have got a man up there, that man Hassett, who don't seem to be a very good man, and he is a very difficult man to get on with."

Hassett was secretary of the Railroad Company.

I said to Mr. Spreckels: "Well, I am not going to change Hassett nor I am not going to give you the management of the railroad unless you buy it and take it. That is the only way you will ever get it." He said: "Well, what will you take for it?" I said: "I have no idea just now of the price. I have got a lot of money into it, and I have got seven years of very hard work in it, and I am not going to get out of it very cheaply." He says: "We will give you \$300,000 for it." I says: "I won't take it."

He seemed very much chagrined by my refusing so flatly to take it, and I don't remember what his threat was, but I remember saying to him: "Well, you can go your own route, and I will go mine." I left that night for New York. That conversation occurred on January 13. According to my recollection they shut down the mine about February 1st, early in February. I was in New York at the time. I did not return until later, until spring. The result of shutting down the mine, on the railroad, was that it took away at least eighty per cent of our earning capacity. It put us in a very bad shape. At that time there was coal in sight at that mine ready for delivery to the cars; the mine was well opened. It was sending out in the way of cargoes all kinds of coal—from one hundred and fifty to two hundred tons a day. From the moment that the coal mine was shut down, from the moment that Mr. Chandler arrived on the scene, I never received any further salary as manager of the Beaver Hill Coal Company. The effect of the shut-down of the mine upon the income of the Coos Bay Railway was that it took away about eighty per cent of the railroad earnings. It was not possible to pay the running expenses of the railway after the shut-down of the Beaver Hill coal mine, and for me to pay my interest on the five hundred and twenty-three thousand dollars. Those were the matters which were the subject of discussion between Mr. Spreckels and myself. That shut off my salary as manager of the Beaver Hill Coal Company. I was not receiving any salary as manager of the Coos Bay Railway Company. I never received a

cent as manager of that railroad. I have this entry in my diary (reading) :

“ Arrived in San Francisco at 8:30. Met Sam-uels. Later on he and Deering met, and they “didn’t get along well. I refused their proposition. Later met A. B. S. He wasn’t pleasant. “I told him he could either go his own way or “stand by. I left for New York at 6:30.”

That was on January 13th. I arrived at New York at 4 P. M. on January 18th. My purpose in going to New York was to try and close up the pending contract which I had with Mr. Huntington and the Southern Pacific Railroad Company. That proposed contract was that they should guarantee the principal and interest of the railway bonds, and the Railroad Company should make a contract, a traffic contract, that we could exchange the traffic from the Coos Bay country with the Southern Pacific at Roseburg, and furnish coal to the Southern Pacific for their engines at Roseburg at three dollars a ton. While I was in New York I had certain correspondence by wire with Spreckels Bros. & Company relative to what they would take to sell out their interests. I have a copy of the telegram I sent them, but my recollection was I sent it at the request of Mr. Huntington to ask what would be the lowest price they would take to get out of the road and the mine. I received a reply.

(Counsel for plaintiff shows witness copy of telegram to R. A. Graham, Care Bank of British North America, New York, dated January 19th.)

(Witness continuing:) Upon being shown this telegram I state that that is the reply I received.

(Counsel for plaintiff offers in evidence the telegram which is admitted by the Court, marked "Complainant's Exhibit 23," which is as follows:

" The Western Union Telegraph Company.
"Received at the Western Union Building, 195
" Broadway, N. Y.
"San Francisco, Cal., 19 Jan.
"R. A. Graham, Care Bank of British North
" America, New York.
" Eight hundred thousand without Czarina and
"bunkers one hundred and fifty thousand more for
"them if all promptly accepted.
" A. B. SPRECKELS.
"Jan 1898. 715 P."

(Witness continuing:) I will explain the reference in this telegram to the words "Czarina" and "bunkers." The "Czarina" was their own steamer that they were using in carrying out coal from the mine to San Francisco and the bunkers referred to were the bunkers on the dock in San Francisco, which were built by them, owned by the Spreckels on some arrangement they had with the wharf. The Beaver Hill Coal Company had no interest in them, but they were used for the purpose of handling the Beaver Hill coal in San Francisco. I did not succeed in putting through any contract with Collis P. Huntington at that time. I returned to Marshfield in the spring. I arrived in Port-

land on March 28th. I arrived in San Francisco on March 30th. Immediately upon my return from New York to Oregon I found the situation to be relative to the mine and the Coos Bay Railway that the mine was shut down. The situation with the railroad was very bad. We had to reduce all of the force of the railroad to a minimum. We only kept two crews. We cut the section hands down as low as we could, reduced the expenses to the smallest possible amount we could possibly do it, and then we were losing money, because this mine had been shut down. We had no traffic. This situation as it developed I had made known to Spreckels Bros. & Company in a prior conversation with Spreckels Bros. & Company. Immediately succeeding my arrival in Oregon I had correspondence with Spreckels Bros. & Company relative to these affairs. The correspondence was in connection with a credit that I claimed should be given to me in the office of J. D. Spreckels Bros. & Company for a cargo of lumber that was shipped to Spreckels Bros. Commercial Company at San Diego, amounting to \$6,000.00, which I wanted applied on the interest of this note as it came due. It was my lumber. I had bought the logs up the Coquille River, and carried them on the railroad to Coos Bay, got them there at E. B. Dean Company's mill on Coos Bay, which was our custom, we had been doing that right along for traffic and selling the lumber to the Spreckels Bros. Commercial Company. I chartered a vessel to carry it down there.

(Counsel for plaintiff shows witness charter party of the Schooner "Peerless," chartered to carry lumber to San Diego.)

(Witness continuing:) I will read aloud who executed that charter party (reading): "James Tuft for owner for R. A. Graham, by telegraphic authority. J. D. Spreckels & Bros. Company, F. S. Samuels, Acting Secy., Agents." I gave Spreckels & Bros. Company telegraphic authority to sign the charter party for me. I shipped the cargo of lumber. My recollection is that the freight was paid, that the cargo amounted to about \$6,000.00. I never received payment for that cargo. J. D. Spreckels & Bros. Company received the money for it. They never paid me for it. As a result of their failure to pay that certain correspondence occurred between us as to their giving credit to me for that on my note. I wrote to them and asked them to give me credit.

(Counsel for plaintiff shows witness dated December 28, 1897.)

(Witness continuing:) Upon being shown the letter dated December 28, 1897, I state that I received that letter. Subsequent to receiving that letter an action was commenced against me on the promissory note for five hundred and twenty-three thousand dollars. It was commenced June 13, 1898.

(Counsel for plaintiff shows witness letter dated June 1, 1898.)

(Witness continuing:) Upon being shown the letter dated June 1, 1898, I state that I received that letter prior to the commencement of the action on the note. I think there was further correspondence between us

prior to the commencement of this action on the promissory note.

(Counsel for plaintiff shows witness letter dated April 2, 1892, addressed to R. A. Graham, signed by E. F. Preston, attorney for the Beaver Hill Coal Company; letter dated April 8, 1898, addressed by E. F. Preston, to Myrick & Deering; a copy of a letter addressed at Roseburg, Oregon, April 11, 1898, by R. A. Graham to John D. Spreckels; letter on the letterhead of J. D. Spreckels & Bros. Company, dated April 14, 1898, and signed John D. Spreckels, with a postscript signed J. D. S.; and a letter dated April 26, 1898, addressed to R. A. Graham by the Beaver Hill Coal Company, Fred S. Samuels, Secretary.)

(Witness continuing:) Upon being shown the above detailed correspondence I state that that correspondence was transmitted between us. I want to explain this first letter given here addressed to Messrs. Myrick & Deering. This is the original given to me by Mr. Deering. The second letter is a copy from Mr. Preston I received from Mr. Deering. He wrote the original to me. This is a copy of a letter I wrote to Mr. John D. Spreckels from Roseburg, Oregon, on April 11th; April 14th, this is a letter I received from Mr. John D. Spreckels, and April 26th, stockholders' meeting of the Beaver Hill Coal Company, is a letter I received in the general course of the mail.

An action was commenced against me for the foreclosure of this note and securities.

(Counsel for plaintiff shows witness copy of complaint in that action.)

(Witness continuing:) This is a copy of the complaint and summons given to me in the commencement of the suit, as I understand it served on me.

(Counsel for plaintiff offers in evidence, which is admitted by the Court the following exhibits: "Complainant's Exhibit No. 24, letter of April 2, 1898, E. F. Preston to R. A. Graham, which is as follows:

"Mr. R. A. Graham,

" Care of Messrs. Myrick & Deering,

" Attorneys-at-Law, City.

"Dear Sir:

" Upon behalf of the Beaver Hill Coal Company, a corporation, I am instructed to make a demand upon you for an accounting for moneys received by you in a fiduciary capacity as the General Manager of such corporation.

" The claim about which the accounting is asked, so far as at present ascertained, amounts to many thousands of dollars, and is of such importance as to warrant your immediate attention.

" I would be pleased to meet yourself or your counsel at an early day relative to this matter, otherwise I am authorized to institute proper proceedings in the premises.

" I am,

" Very respectfully yours,

" E. F. PRESTON,

" Attorney for Beaver Hill Coal Company."

(Complainant's Exhibit No. 25.)

" April 8, 1898.

"Messrs. Myrick & Deering,

" Attorneys-at-Law,

" 14 Sansome Street, City.

"Gentlemen:

" Your favor of yesterday concerning R. A. Graham received. It would not be seemly for me to use in a communication to your firm the technical designation of the acts which we called in our last communication a diversion, and we do not propose to waste any time with Mr. R. A. Graham or his man Hassett. I shall consider and treat your note as a declination upon the part of Mr. Graham to repair the situation as far as might be in his power.

" Concerning the suggestion that the principals meet, the street is very broad which leads to the office of J. D. Spreckels & Brothers Company and to the office of the Beaver Hill Coal Company. There is no objection to Mr. Graham traveling it if he so desires.

" With kindest regards to you and thanks for your courtesy,

" I am,

" Very sincerely yours,

" E. F. PRESTON."

(Complainant's Exhibit No. 26.)

“ Roseburg, Oregon, April 11, 1898.

“John D. Spreckels, Esq.,

“Dear Sir.

“ In view of the complications that has arisen in
“consequence of you shutting down the mine and
“failing to carry out your contract with me to fur-
“nish money to operate and maintain it, I have been
“advised by my attorney here to commence action
“and protect my interest as well as that of my
“creditors in this term of court commencing May
“the 2d.

“ Agreeable to his advice and very much to my
“displeasure I have told him to go in and prepare
“the papers and start the suit. They won't be
“filed for a few days yet and in the meantime if
“you have any suggestion whereby our past pleas-
“ant relations would not terminate so unpleasantly
“I would be pleased to meet you and discuss it. I
“will be here two or three days yet and should you
“in your opinion think that a better and more pleas-
“ant solution of the problem be brought about I
“would be disposed to delay matters though it
“should necessitate my returning to San Francisco
“and meeting you, or adjusting our differences by
“arbitration if there should be any details we would
“be unable to adjust ourselves.

“ We have only 10 days left to file our suit
“should we be unable to agree.

“ I am yours truly,

“

R. A. GRAHAM.”

(Complainant's Exhibit No. 27.)

Letterhead of J. D. Spreckels & Bros. Company.

" San Francisco, Cal., April 14, 1898.

"Mr. R. A. Graham,

" Roseburg, Oregon.

"Dear Sir:

" Your letter of April 11th at hand, and I am
"not surprised at your position. You are very
"welcome to commence any action that you please,
"and I hope you will not delay doing so. It would
"be a fitting sequel to the results shown by the
"investigation of your accounts and the manner in
"which you have disposed of the property of the
"Beaver Hill Coal Company and moneys obtained
"by you from this city upon requisitions for spe-
"cific purposes for the company's sole use."

(Witness continuing:) I will interrupt to state that J. D. Spreckels Bros. & Company never produced any evidence that I had ever diverted a single cent of the Company's moneys from its affairs. They never produced any evidence to me, or in any Court that I had ever diverted to any use any money that was sent to that company for a specific use. No case ever commenced by them on any of these proceedings ever went to judgment against me.

(Continuation of letter, Exhibit No. 27:)

"You were invited to make explanation, if you
"could, while you were here, but you thought best

“to not avail yourself of the opportunity offered,
“and your departure and your communication from
“Oregon to me are in perfect keeping and con-
“sonance with the treatment experienced by us
“from you in the past.

“ It is not our intention that this matter shall
“go without attention and we will try to convince
“you before we are through, that we not only know
“our rights, but that we are abundantly able to
“maintain them. Had you offered any reparation,
“surrendered all the properties in your hands, and
“thrown yourself on our generosity, we would have
“been disposed to consider the past more leniently,
“but you do not appear to comprehend this view
“of the situation.

“ I am,
“ Very respectfully yours,
“ JOHN D. SPRECKELS.

“ P. S. I see you write from the office of J. W.
“Hamilton, Attorney-at-Law. Permit me to re-
“mind you that Mr. Hamilton was carried on the
“books of the Beaver Hill Company as its regu-
“larly retained attorney during the entire period
“under consideration.

“ J. D. S.”

(Witness continuing:) Mr. J. W. Hamilton was my attorney. In reference to the phrase in that letter, “had you offered any reparation we would have been disposed to consider the past more leniently,” I will state that I was never asked to make any reparation for anything; no demand was ever made upon me.

(Complainant's Exhibit No. 28 is as follows:)

" San Francisco, Cal., April 26th, 1898.

"R. A. Graham, Esq.,

" Marshfield, Or.

"Sir:

" The annual meeting of the stockholders of the
"Beaver Hill Coal Company will be held in the
"office of said company, 327 Market Street, San
"Francisco, on Tuesday, May 10th, 1898, at 2
"P. M.

" Yours respectfully,

" BEAVER HILL COAL CO.,

" Fred'k S. Samuels,

" Secretary."

(Witness continuing:) I attended the meeting of the stockholders of the Beaver Hill Coal Company on Tuesday, May 10th, 1898, referred to in that letter. I went to the office of J. D. Spreckels & Bros. Company where the meeting was to be held. I am speaking of May 10, 1898. I will read the entry in my diary of May 10th:

" This should have been the annual meeting day
"for Beaver Hill Coal Company, but they refused
"to see me or hold the meeting. Seen Deering af-
"ter. Seen Allen and C. A. Spreckels."

(Witness continuing:) I went to the office of Spreckels Bros. and Mr. Walter D. K. Gibson was there in attendance. I asked him if Mr. A. B. Spreckels

was in. He said no, he was in the park. I asked him if Mr. John D. was in. He said no. I asked him if Mr. Samuels was there. He said no. Then I said: "This is the annual meeting day of the Beaver Hill Coal Company, and I have been notified to attend. Here is the notice. What are you going to do about it?" He said: "I am not going to do anything about it, because I don't know nothing about it." That was all that was said. During my trip to San Francisco I again returned to the office of J. D. Spreckels & Bros. Company. At that time I saw Mr. Gibson. I asked if Mr. A. B. Spreckels or Mr. J. D. Spreckels was in, and he said yes. I says, "Will you tell them I am here?" He said, "Yes." He went into the inside office, the private office of Mr. J. D. and A. B. Spreckels, and he came out in a minute, and with a good deal of emphasis he put his hand on the counter and he says: "They will not see you." That meeting was within a day or two of the date of the annual meeting. After that I went away. The action against me by Spreckels Bros. for the foreclosure of the securities on the note of five hundred and twenty-three thousand dollars was started Monday, June 13th. I have a memorandum. It reads: "Monday, 13th of June, Spreckels sued his railway claim and served me with a summons."

MR. McNAB: If your Honor please, the first instrument, which is marked Complainant's Exhibit 29, is a charter party, made and concluded upon in San Francisco on the 27th of August, 1897, between James Tuft, agent for the owners of the schooner "Peerless," and R. A. Graham, of Coos Bay, providing for a char-

ter party on certain bases, and signed by James Tuft, and for R. A. Graham by telegraphic authority, J. D. Spreckels & Bros. Co., F. S. Samuels, acting secretary. The charter party is rather long and I will not read it all.

(Witness continuing:) Pursuant to that charter party which I had authorized Spreckels to sign for me there was shipped a cargo of cedar lumber.

(Counsel for plaintiff shows witness letter dated December 28, 1897, containing memorandum with regard to a cargo of lumber.)

(Witness continuing:) Upon being shown the letter dated December 28, 1897, I state that the reference in that letter is to the cargo of lumber.

(The letter is as follows, on the letter-head of J. D. Spreckels & Bros. Company:)

“ San Francisco, Cal., Dec. 28th, 1897.

“R. A. Graham, Esq.,

“Mgr. Coos Bay, Roseburg & Eastern R. R. &

“ Nav. Co.,

“ Marshfield, Or.

“Dear Sir:

“ Your favor of 24th inst., to hand, enclosing
“check for \$2,615.81, being the amount of one
“month’s interest on your note to Dec. 1st, at the
“rate of 6% per annum. Enclosed herewith please
“find our receipt for same.

“ With regard to the credit for a cargo of lum-
“ber delivered to the Spreckels Bros. Commercial
“Co., at San Diego, as you are coming here before
“long we will defer making the credit until we see
“you with regard to this matter.

“ We remain,

“ Yours very truly,

“ J. D. SPRECKELS & BROS. COMPANY.

“ W. D. K. Gibson,

“ Treasurer.”

(Witness continuing:) My recollection is that that cargo sold to the Spreckels Bros. Company for six thousand dollars; at least it was enough to pay two months' interest if credited.

(Counsel for plaintiff shows witness letter dated June 1, 1898. It is a part of Exhibit 31 on the letter-head of J. D. Spreckels & Bros. Company, and is as follows:)

“ San Francisco, Cal., June 1, 1898.

“R. A. Graham, Esq.,

“ Marshfield, Ore.

“Sir:

“ We are in receipt of your communication of
“May 27th, and cannot by any possibility under-
“stand your reference to any credit in our hands,
“as there is none, as you well know. Your non-
“payment of interest falling due May 2d, 1898, on
“the note executed by you to J. D. Spreckels &
“Bros. Co. dated November 1, 1897, for \$523,-

“162.52, and your non-payment of interest falling due on June 2d, 1898, upon the same note, gives us the right by the terms of the note to foreclose our securities, which we will proceed to do.

“ Further communication upon this subject is unnecessary.

“ Most respectfully,

“J. D. SPRECKELS & BROS. COMPANY.

“ F. S. Samuels, Acting Secretary.

“ Duplicate of this to Salem, Oregon.”

(Witness continuing:) That credit was in their hands. The action was commenced. I appeared at the action. It went to trial. It lasted from the 10th of April until the 25th of May—it isn't clear—but the last day we were on trial appears to be May 15th. In that action, among other defenses, this charter party, and the credit lying in the hands of J. D. Spreckels & Bros. Company was set up as one of my defenses, and tried in the action. The reason the action was stopped was because we took the settlement of this, that ended up in this contract of June 8th, 1899. Going back a little, immediately succeeding the action against me for the foreclosure of this note and the securities, there was another action commenced against me by John D. Spreckels & Bros. Company. It was commenced June 17, 1898, in San Francisco. The plaintiff was the Beaver Hill Coal Company and I was the defendant. In that action they alleged in the complaint embezzlement and they alleged fraud, they alleged stealing,

everything that you could imagine along those lines I think. That action was commenced on the 17th; I was served on the 17th of June. On the evening of June 17th, the day this action was commenced, an article concerning the action appeared in the San Francisco "Bulletin." I read it. I subsequently saw clipping from that Newspaper at the Beaver Hill Coal Mine or around in that section of the country, referring to that article—at least that article was specified in it—posted up on the windows of the Beaver Hill store and nailed onto a couple of stumps around the yard, so that it would be prominent for the miners and other people to look at it. At the time that second action was commenced I was in San Francisco. Shortly after I went to Roseburg. While in San Francisco I had negotiations looking to the raising of money, or financing a project. I was having negotiations with a Mr. Henry F. Allen, of the firm of Allen & Lewis, and I was borrowing from him, and getting him to join with me in the opening up and development of what afterwards was the Klondike mine. We were working on it at that time, and the day the article came out, I had arranged with Mr. Allen in which he was sending his representative with me to Marshfield, Oregon, that night, to examine the property. The next morning after this appeared in the newspaper, he notified me that it was all off; that I would have to show them that I was not the kind of a fellow that these papers indicated I was before anybody would come in with me and furnish any money. I was trying to raise funds at that time to open and develop the Klondike mine and to build a spur in

there, and to keep up my expenses on the railroad. After the commencement of this foreclosure suit I did not have any property or assets that were not then in the hands of J. D. Spreckels & Bros. Company except the stock of the railroad that was not pledged with the note, and the Beaver Hill mine, which was designated the Klondike mine. The Klondike mine was not a mine, it was only a prospect. The spur was not built at that time, I was building it and paying for it. I can produce a copy of the article that appeared in the "Bulletin." It is a copy of the same evening Bulletin that I saw posted around the mine in Oregon, the same issue. Mr. Priestley, Assistant Curator of the Bancroft Library, of the University of California, Berkeley, and I compared it. It is a true and correct copy of the article appearing in the "Bulletin" at that time.

(Counsel for plaintiff shows witness an issue of the San Francisco "Examiner" on file with the Bancroft Library, at Berkeley, of the issue of the following morning, June 18, 1898.)

(Witness continuing:) Upon being shown the copy of the "Examiner" of the issue of June 18, 1898, I state that it is a true copy, compared by me, of the issue of the San Francisco "Examiner" of that date. In the article from the "Bulletin" there is no statement by me of my side of the controversy; I did not see any "Bulletin" reporter. In the article which appeared the following morning in the "Examiner" there is an interview with me. After the "Examiner" people had read the "Bulletin" they came up and hunted me up.

To my knowledge the "Examiner" article was never sent to Marshfield. I never heard of it. It never was posted on the stumps at least, or the Beaver Hill store windows. If it was ever sent there, it was never posted for the benefit of anybody else.

MR. McNAB: Gentlemen, do you insist on my proceeding further with regard to the competency, that is, in regard to being a true copy?

MR. DUNNE: Of course, We are not going to object that he has not brought the printed paper here—of course not. If this sort of testimony is admissible, we don't object to it on the ground that it is not the original paper—certainly not.

MR. McNAB: Of course it is introduced on the theory of oppression.

(The paper is marked "Complainant's Exhibit No. 33," and is as follows:

" Trouble of the Beaver Hill Coal Company.
"Its Oregon Agent, R. A. Graham, Charged With
" Embezzlement.

" The Beaver Hill Coal Company has sued R.
"A. Graham, its ex-agent in Oregon, for an ac-
"counting. Grave charges of fraud and embezzle-
"ment, defalcation and misappropriation, are con-
"tained in the complaint.

" It is asserted that Graham became the Com-
"pany's agent in Oregon in May, 1895. He had to
"conduct all the business of the concern there, and

“among other things it was his duty to obtain from
“J. D. Spreckels & Bros. monthly sufficient money
“to carry on the business under an arrangement
“entered into between Spreckels Bros. and the
“Beaver Hill Company. In this way Graham is
“said to have drawn from Spreckels Bros. in requisitions, up to March last, \$457,029.20. And
“from other sources he received as much as \$100,-
“000.

“ In December last Graham ceased to be an
“agent of the company. Thereupon he was ordered to turn over the property and money in his
“charge and all he turned over was \$1,486.14. The
“books of accounts he kept until January 22 last,
“when he gave them up. These books showed that
“all the money he had received had been paid out
“except the sum he turned over. It is now alleged
“that these books of account do not truthfully state
“the transactions of the company’s business; that
“they have been decidedly ‘cooked’; that Graham
“has made away with money intrusted to him to the
“amount of \$200,000 in round numbers; that to
“cover up his nefarious deeds he has wilfully falsified the accounts. In support of these allegations
“a number of entries on the books are quoted of
“sums purporting to have been paid out by Graham
“in running the company’s business, but which entries are known to be false and fraudulent.

“ On these grounds the company asks that its
“ex-agent be required to account for every penny

“received and disbursed during his term of stewardship; that he be adjudged guilty of fraud and misappropriation; that he be mulcted in a judgment of at least \$200,000.”

(Witness continuing:) None of those charges against me were true.

(Counsel for plaintiff offers the article from the “Examiner,” which is admitted by the Court, marked, “Complainant’s Exhibit No. 34, and is as follows:)

“ Fighting for the Beaver Hill.

“Big Lawsuits Concerning the Oregon Coal Mine.
“Former Manager R. A. Graham Charged with
“ Misappropriating a Large Amount.

“ R. A. Graham has been sued for \$200,000 by
“the Beaver Hill Coal Company, an Oregon corporation, in which the John D. Spreckels & Bros. Company of this city are largely interested. In
“the complaint it is alleged that Graham misappropriated the amount demanded while he was acting as General Agent and Manager of the
“Beaver Hill mines at Marshfield, Or. It is asserted that Graham required large sums of money
“and the funds were supplied to him by the Spreckels Company. In this way, it is alleged,
“he received altogether \$457,029.20 and collected
“additional amounts from the sale of coal and logs.

“ Graham resigned December 15, 1897. Experts were employed to scrutinize the accounts,

“and it is charged that they discovered that the pay
“roll was stuffed to the extent of \$1,000 a month
“for more than a year, and large sums were charged
“up for supplies that were never delivered. It is
“charged that on the 31st of last October he re-
“ported that he had paid \$30,000 for logs, but in-
“vestigation disclosed the fact that he bought no
“logs for the company, but simply made the entry.

“ The complaint is sworn to by F. S. Samuels,
“Secretary of John D. Spreckels & Bros. Company
“and one of the directors of the Beaver Hill Coal
“Company. The Court is asked to give judgment
“for \$200,000 and to adjudge Graham to be guilty
“of embezzlement. The attorney for plaintiffs is
“E. F. Preston.

“ Mr. Graham says this suit is instigated with a
“view to injuring his credit in engineering a deal
“to control about 9,000 acres of coal land adjoin-
“ing the 480 acres of the Beaver Hill property.

“ ‘I was the original owner of the Beaver Hill
“mine,’ said he, ‘and I still own a half interest. In
“1894 I went in with the Spreckelses, they agree-
“ing to supply the funds needed to develop the
“mine. The mine has not paid, but it is immense-
“ly rich, and I believe they are trying to freeze me
“out and get entire control. I have never misap-
“propriated one cent. I got out last December and
“went east. In February they shut down working
“the mine. On June 7 I had a receiver appointed,
“bringing suit against the company to compel them

“to work the mine. I own the railroad leading to
“the mine, having borrowed \$523,000 from the
“Spreckelses to build it. This money isn’t due un-
“til next November, yet on June 13th they sue me
“for that amount. When the mine is not working
“the road does not pay. They evidently want to
“control the whole works. My accounts are not
“one dollar out of the way. If they are, why don’t
“they have me arrested? Mr. Deering is my attor-
“ney and will show up the whole matter in court.”

(Witness continuing:) That case was never tried. There was no truth in any of the charges brought against me in that complaint as stated in this article. Subsequent to the commencement of the action for the foreclosure of the securities in San Francisco a demand was made on me by J. D. Spreckels & Bros. Company for the transfer of the stock, the 10,001 shares of stock to J. D. Spreckels Bros. & Company, as pledgee, on the books of the Coos Bay Railway. The demand was made upon me by a San Francisco lawyer by the name of Powers, Frank Powers. I refused the request. He came to Marshfield, Oregon, to make that demand. I refused to transfer the stock to their name as pledgee on the books of the Coos Bay Railway. The action was brought on June 13th. I will refer to my diary to see when the demand was made upon me. The demand was made upon me on July 12, 1898. I will read the memorandum from my diary:

“ Got up at 4 A. M. and started Idleman off on
“the engine. Powers called at 11 and served a

“notice on me to issue a new certificate, which I
“refused. Young Watson then called and served
“another notice, which looked like an affidavit. In
“the office balance of day.”

(Witness continuing:) That is the memorandum of July 12th. I find I have a memorandum here of July 11th that I got on the same subject. The memorandum from my diary on July 11th is:

“ In the office all day and up to midnight work-
“ing on affidavits. Powers called and demanded
“that we issue him a new certificate of stock for
“the one Spreckels holds as collateral security to
“my note. This I refused to do.”

When Mr. Frank Powers called at my office he said he represented J. D. Spreckels & Bros. Company. After his making this demand I refused to accede to it. Then it occurred to me that probably he might have some rights, and it might be the meaning of some other process started. So I telegraphed to Mr. F. P. Deering, of San Francisco, that same day, stating to him that Powers had called and made this demand, and asked for an immediate reply as to whether he had any right to the demand or not. Mr. Deering telegraphed me the same evening or next morning to say that they had no rights, and that a reference to a suit, giving the number of the book, called the *Spreckels v. The Nevada National Bank*, that would suffice to show they had no rights in the matter; to have this pledged stock transferred to their name, in other words. The “Spreckels” named in that suit are the same family of Spreckels that

are litigating with me in this Court. Mr. Deering was very distinct in the end of his telegram, to the effect that the pledgee was not entitled to it. This was some considerable time before the actual trial of the action for the foreclosure of this collateral. The actual trial commenced the following spring, April 10th.

MR. McNAB: I desire to introduce in evidence the stub of the certificate No. 5 of the Beaver Hill Coal Company, for the 2500 shares issued to R. A. Graham on May 15, 1895. For the purpose of showing its date of cancellation and its transfer to J. D. Spreckels & Bros. Company to be April 28, 1898; our contention being there was a consistent line of conduct to secure the possession of all these securities.

THE COURT: This other stock that Powers referred to, was that railroad stock?

MR. McNAB: That was Coos Bay Railroad stock.

THE WITNESS: This is not the stock. This is Beaver Hill Coal Company stock. Powers referred to Coos Bay Railroad Stock.

(Counsel for plaintiff offers in evidence entry from book entitled: "Stock and Transfer Book, Beaver Hill Coal Company." The entry is the following entry from page "o," immediately preceding page 1, which was admitted by the Court, and is as follows:

(Counsel for plaintiff offers in evidence a page in the second section of same book, preceding page 1, which is as follows:

“Date—1898, April 28; Transferred by R. A. Graham; Ledger folio, 7; Number certificate surrendered, 5; Number shares transferred, 2500; Favor of A. B. Spreckels; Ledger folio, 22; Number certificate issued, 6; Total number shares, 2490.”

(Witness continuing:) I never gave my consent to the transfer of these shares of stock to A. B. Spreckels; I never heard of it.

MR. McNAB: I would like to have this page copied into the record:

“Ledger folio 9, Number of certificate issued, 7; Total number shares, 10.”

(Witness continuing:) I never knew until this proceeding was commenced and on trial that that transfer had been made, either to A. B. Spreckels or to W. D. K. Gibson. I didn't know anything about it. I was a director of the Beaver Hill Coal Company from its inception. I never had any notice to the effect that I was removed as a director of that company. At the time that I endorsed my name on the book of this stock, there was no understanding, agreement or conversation to the effect that that company should have a right to transfer that stock to any person. It was never suggested to me by them or any of them. I exercised my rights under that stock by attending directors' meetings

from time to time. I voted at those meetings. I participated in the meetings. There was never question raised as to my right to appear as a director. I received notices from time to time to appear as a director at the meetings. I think that that was endorsed about the time it was issued. I never took that stock out of the Beaver Hill Coal Company's office. That is my endorsement on the back, endorsed in blank.

(A recess was here taken until 2 P. M.)

TUESDAY, APRIL 18, 1916, 2 P. M.

(Direct examination of R. A. Graham resumed.)

MR. McNAB: I will read the essential allegations of the suit for the foreclosure of the securities, commenced in San Francisco.

(Marked "Complainant's Exhibit No. 32.")

*"In the Superior Court of the City and County of
" San Francisco, State of California.*

*"J. D. Spreckels and Brothers Company,
" a corporation,
" Plaintiff,*

" vs.

*"R. A. Graham,
" Defendant.*

" COMPLAINT.

*" Now comes the above named plaintiff, by its
" attorneys, E. F. Preston and W. L. Pierce, and*

“complaining of the above named defendant, for
“cause of action alleges:

“ I.

“ That the plaintiff is, and was at all times
“herein mentioned a corporation organized and ex-
“isting under the laws of the State of California.

“ II.

“ That on the first day of November, 1897, at
“the City and County of San Francisco, State of
“California, the said defendant, R. A. Graham,
“made and executed to the plaintiff his certain
“promissory note in writing, bearing date on that
“day, which said promissory note is in words and
“figures following, to-wit: (Here follows the
“note) * * *

“ III.

“ That no part of said note, or of the interest
“thereon has been paid except the sum of \$10,-
“463.14.

“ IV.

“ That there is now due and unpaid the inter-
“est thereon for the month of April, 1898, which
“by the terms thereof became due and payable
“May 1st, 1898, and for the month of May, 1898,
“which by the terms thereof became due and pay-
“able June 1st, 1898, to the amount of \$5,231.62;
“and that the plaintiff has duly demanded payment

“thereof from the said defendant which defendant
“has refused and not paid.

“ V.

“ That said defendant at the time of making said
“note delivered to the said plaintiff the said se-
“curities therein mentioned and described, and that
“the plaintiff now has, holds and possesses the se-
“curities in the note herein set forth.

“ VI.

“ That the security last mentioned and described
“in the said note and commencing: ‘Deed to the fol-
“lowing property,’ is a mortgage of a certain real
“property situated in the State of Oregon.

“ WHEREFORE, Plaintiff prays that he may
“have judgment herein directing the sale of said
“securities herein described excepting only the se-
“curity heretofore mentioned and commencing:
“‘Deed to the following property,’ according to
“law; that the plaintiff or any persons may become
“purchasers at such sale; that out of the proceeds
“of such sale that plaintiff may be paid in United
“States gold coin the cost of such sale and the cost
“of this action and the sum of \$528,394.14 with in-
“terest thereon from the first day of June, 1898, at
“the rate of 6% per annum.

“ That the defendant, and all persons claiming
“or to claim under him, may forever be barred and
“foreclosed of all right, title, claim or equity or

“redemption in or to the aforesaid securities here-
“in for which a sale is prayed for.

“ And that if it appears from the returns of such
“sale made to this court that the proceeds thereof
“are insufficient to pay all of said sum, and that a
“balance still remains due thereon, that judgment
“be had in favor of the plaintiff for such deficiency
“against the said defendant, R. A. Graham, who
“is liable thereunder as provided by law; and for
“such other and further relief as may be equitable
“and to this court may seem just.

“ E. F. PRESTON,

“ W. L. PIERCE,

“ Attorneys for Plaintiff.

“City and County of San Francisco,

“State of California.—ss.

“ J. D. Spreckels, being first duly sworn, de-
“poses and says, that he is President of the J. D.
“Spreckels and Brothers Company, the plaintiff
“named in the foregoing complaint; that he has read
“the foregoing complaint and knows the contents
“thereof, and that the same is true of his own
“knowledge, except as to those matters that are
“therein stated upon his information and belief, and
“that as to those matters, he believes them to be
“true.

“ (Signed) JOHN D. SPRECKELS.

“ Subscribed and sworn to before me this 13th
“day of June, 1898.

“

JAMES MASON,

“ Notary Public in and for the City and County
“ of San Francisco, State of California.

“ (SEAL).”

(Witness continuing:) When I went to trial on the action for the foreclosure of their securities my financial condition was very bad. I was borrowing money to carry on this little mine in Oregon, known as the Klondike mine, and to keep the railroad up, and borrowing money to fight this lawsuit, to pay the lawyers and expenses. In reference to the discussion on the question of the endorsement on the back of these 2500 shares the understanding in relation to the stock issued to me was that they were to remain in the hands of J. D. Spreckels and Bros. Company as collateral securities for anything, first, that the Beaver Hill Coal Company might owe them for advances made for the opening and development of the mine, and in addition to that for anything after that that I might owe on account of the railroad. They were held as collateral security for my general debts to them. At the time of the commencement of the foreclosure action I was indebted. The property which then stood in the hands of J. D. Spreckels & Brothers Company was ten thousand and one shares of railroad stock, the stocks of the Beaver Hill Coal Company, the insurance policy and the land at railroad Addition to Marshfield, and the bonds of the railroad. The stock of the Beaver Hill Coal Company at that time and the life insurance policy,

in the hands of J. D. Spreckels and Brothers Company was against my agreement. The agreement was made by which they were to be returned to me on November 3rd. Therefore, I then had during this litigation as my only property free from encumbrance the remaining shares in the Coos Bay Railway and whatever I owned in this Klondike mine. The Klondike mine was not developed. During this litigation I borrowed money. I found it necessary to borrow seventy thousand dollars. I borrowed that from the Crocker Woolworth National Bank of San Francisco. I gave them as security a note endorsed by Mr. T. R. Sheridan. In addition they had about half of the stock I had left me of the Coos Bay, Roseburg & Eastern Railroad, and some stock of the Beaver Coal Company which we know as the Klondike mine. All the security continued to remain with the Crocker-Woolworth National Bank as security for payment of that obligation of seventy thousand dollars throughout this litigation, and up to the time that we were making this agreement of June 8th. In order to carry out that agreement I had to get the stock from the Crocker-Woolworth Bank, the railroad stock, and before agreeing to the agreement I went to Mr. William H. Crocker, of the Crocker Bank, and stated the conditions as well as I could, and asked him, to enable me to carry out this agreement, if he would surrender that much of his security, which he did. In lieu of that security I gave some more Beaver Coal Company stock, all that I had of it. As a result of these transactions, at the time this agreement of June 8, 1899, was entered into I did not have any property free from

encumbrance; nothing at all. Outside of what I owed to J. D. Spreckels & Bros. Company I should say roughly I owed a hundred thousand dollars. I did not have any stock or securities of any kind that were free of liens. At that time I was not receiving any salary from either the Coos Bay Railroad or from the Beaver Hill Coal Company, or from any other source whatever. I would have been unable under any circumstances to have paid my debts.

(Counsel for plaintiff shows witness copy of agreement between the Crocker National Bank and the Beaver Hill Coal Company signed by R. A. Graham, President.)

(Witness continuing:) This peice of paper is an agreement that I gave the Crocker National Bank signed by the Beaver Hill Coal Company, R. A. Graham, President. The Beaver Hill Coal Company is what we know here as the Klondike mine. The other instrument is some kind of an agreement I had to sign with the Crocker-Woolworth Bank, giving them the right to dispose of the securities in whatever way they saw fit.

(Counsel for plaintiff offered the two documents in evidence which were admitted by the Court, marked respectively; "Complainant's Exhibit No. 35" and: "Complainant's Exhibit No. 36."

(Complainant's Exhibit No. 35.)

“ April 5th, 1899.

“Crocker-Woolworth National Bank

“ of San Francisco, Cal.

“Gentlemen:

“ We send you herewith the stock book of the
“Beaver Coal Co., in which are written Certificates
“of Stocks Nos. 11 to 19, aggregating 8633 shares
“in the name of R. A. Graham, endorsed by him
“which certificates we hereby authorize you stamp
“charging the cost to us in case the obligations of
“this company or R. A. Graham should require that
“you resort to the said certificates of stock either
“for sale or as collateral for any note or obligation
“of the Beaver Coal Company or R. A. Graham.

“ Yours very truly,

“ BEAVER COAL CO.

“ By R. A. Graham, President.

(Complainant's Exhibit No. 36.)

“ IN CONSIDERATION of One Dollar, to
“us in hand paid, by The Crocker-Woolworth
“National Bank of San Francisco, the receipt
“whereof is hereby acknowledged, and also in con-
“sideration of any further advances of money which
“the said The Crocker-Woolworth National Bank
“of San Francisco, may hereafter deem proper to
“make to us upon promissory Notes, Overdrafts
“or otherwise, we do hereby assign, transfer and
“deposit with said The Crocker-Woolworth Nation-

“al Bank of San Francisco as collateral security
“for the payment of said Promissory Notes, Over-
“drafts or other indebtedness or liability, and the
“interest and expenses which may accrue thereon,
“all personal property of which we are the sole
“owners, this day delivered by us or which may
“hereafter be delivered by us to said The Crocker-
“Woolworth National Bank of San Francisco, dur-
“ing the existence of this agreement, the same being
“stored or deposited at our risk and expense; the
“power of sale, etc., hereinafter given, shall apply
“to all collaterals in possession of said The Crocker-
“Woolworth National Bank of San Francisco, at or
“before said sale. In case of non-payment of all
“or any of said Promissory Notes, Ovedrafts, In-
“debtedness or other liability or the interest there-
“on when due, we hereby appoint and constitute
“Wm. H. Crocker, or assigns, our attorney in
“fact, irrevocable, with powers of substitution, and
“hereby authorize, empower, and instruct our said
“attorney or assigns to sell, at any time after
“maturity of any of said Notes, Ovedrafts, In-
“debtedness or other liabilities, or the interest, with-
“out any previous demand, or demand of per-
“formance upon us, and with or without notice to
“us, at his option, the whole or any part of said
“securities, either at public or private sale, at his
“discretion, and without any advertisement or notice
“of such sale, and to deliver the same to the pur-
“chaser or purchasers thereof, the proceeds to be
“applied to the payment of our Promissory Notes,

“Overdrafts, Indebtedness or other liabilities, interest due, and other expenses, together with ten per cent commission on sales, any surplus, after payment of all our said Notes, Overdrafts, Indebtedness or other liabilities, interest, commissions and expenses, shall be subject to our order.

“ In like manner, we agree to pay on demand, in United States Gold Coin, to said The Crocker-Woolworth National Bank of San Francisco, in this city, or assigns, whatever balance may be due after sale of securities, and application of proceeds above provided for. In case of deterioration of any of the above mentioned securities, or fall in the market, value of the same, we hereby promise and agree to reduce the amount of debt, or to increase the security in proportion to such deterioration or decrease of value, in default of which all our said Notes, Overdrafts, Indebtedness or other liabilities are to be considered and treated as due and payable; and said attorney, at his option, is thereupon authorized, at public or private sale, and without any demand, or demand of performance, advertisement, notice or delay, to sell said securities, and to apply the proceeds to payment of principal of our said Notes, Overdrafts, Indebtedness or other liabilities, and interest, costs, commissions, and all expenses incurred, hereby agreeing to save harmless our said attorneys from any loss incurred by him in such sale; but in case of payment of all our said Notes. Overdrafts, Indebtedness or other liabilities, and in-

“terest according to the terms thereof, then this
“agreement to be void, and any securities remain-
“ing to be returned to us. Should any such sale
“be made, Wm. H. Crocker directly, or in the name
“of any other person, shall have the right to pur-
“chase.

“ WITNESS our hands and seals, at San Fran-
“cisco, Cal., this 14th day of June, A. D., 1899.

“ Signed BEAVER COAL CO. (Seal)

“ By R. A. Graham, President.

“ Signed R. A. GRAHAM (Seal)

“Copy.”

(Witness continuing:) After the case of J. D. Spreckels & Bros. Company against me for the foreclosure of these securities had been commenced, and all the way during the trial, there were efforts from both sides to compromise the case and make a settlement, and about the 15th of May, I think it was, or thereabouts, we commenced getting delays from the Court, stating to the Court that a settlement was under discussion. From that time on until an agreement was finally consummated we were in conference. During the time that Court was adjourned for the purpose of enabling us to discuss this compromise, I had conferences with Collis P. Huntington, president of the Southern Pacific Company, relative to this property, in his office. I don't recall any particular days on which I met him. I don't think I seen him more than once in reference to the matter. That was when the settlement was reasonably well along, and he said to me:

“Well, don’t agree to anything less than six months. Get more time, if you can, but if you can’t get but six months, why that will do. We will have to settle.” During that six months he said he would bring about such arrangements as would in all probabilities get this money. I came to a settled and fixed understanding with Collis P. Huntington, president of the Southern Pacific Railroad Company, as to what that company and Mr. Huntington would do in the way of an arrangement with me. This understanding was the result of a great many discussions that had run over two or three years, or maybe more. The discussions were ended up with the conclusions of Mr. Huntington that we should take six months. He stated his conclusions to me. The arrangement was that the Southern Pacific Company was to guarantee the interest and principal of these bonds; that guarantee would sell the bonds at ninety-five, of the first bonds that were issued at this time, 620. I was to turn those over to the Southern Pacific Company for which they would advance me \$550,000, the amount we agreed upon to pay the Spreckels, and then the balance coming to me out of the bonds would be given to me as fast as the bonds were sold, and we had the assurance of Mr. Marsden, who was the president of the Farmers’ Loan & Trust Company at that time, that the bonds would sell for ninety-five with this guarantee. In addition to that we were to make a contract with the Southern Pacific Company agreeing to deliver them all of the freight that we could gather in the territory of the Coos Bay Company, at Roseburg, at a fixed division or rates; we were to furnish them coal

at Roseburg from the Beaver Hill Mines at three dollars a ton. It was two or three or four days prior to the signing of this agreement of June 8, 1899, that I came to my final settlement with Mr. Huntington as I have just testified. During this agreement and during these negotiations, Mr. John Garber was my personal attorney and was advising me concerning my rights under this agreement during the negotiations. Mr. Huntington, president of the Southern Pacific Railroad Company sent me to Mr. William F. Herrin and Mr. Herrin sent me to the firm of Garber and Garber. Mr. John Garber finally became my counsel in the case. When the discussion commenced relative to the entering into of this agreement there was a demand made upon me by Spreckels Bros. & Company relative to what I should do with the stock and bonds in the Coos Bay Railway and other interest there. At this particular time I didn't discuss this with any particular member of the firm of John D. Spreckels & Bros. Company. My discussions were entirely with my own lawyers through their lawyers. Mr. Spreckels and I wasn't on speaking terms and hadn't spoke since to each other, hadn't from December prior to going into Court, the whole discussion was conducted between the lawyers. I never met any member of the firm J. D. Spreckels & Bros. Company at any time during the proceedings, with one exception. I met Mr. Samuels one afternoon in Colonel E. F. Preston's office during the very end of the proceedings. My attorney submitted to me a proposal which they said had been demanded of them by the other side, relative to what I should do with the stocks and

bonds of the Coos Bay Railroad Company and other properties. The first proposition came to me through a member of the firm of Garber and Garber named Creswell. He had a discussion with Mr. J. D. Spreckels and the offer was that we should pay Mr. J. D. Spreckels & Bros. Company six hundred thousand dollars for their interests in the property of Coos Bay, and give them, pending the payment of this money, the control and possession of the Coos Bay Railroad, and everything connected with it; give them the management of it and turn the property over to them, which I refused to do without any discussion at all.

(Counsel for plaintiff offers the contract in evidence.)

(Contract marked: "Complainant's Exhibit No. 37 and copy attached to the Deposition of Frohman substituted.")

(Witness continuing:) Upon being shown this original agreement I state that that is my signature to it. There are various interlineations on the face of this instrument and in Subdivision A of paragraph 6 in the following clause:

" That the first party shall deliver to said trustee (a) All of the shares of the capital stock of the said Coos Bay, Roseburg & Eastern Railroad & Navigation Company in excess of the ten thousand and one shares thereof now held by the second party, certificates therefor to be properly endorsed excepting seven shares thereof to be issued

“to the directors of said company as hereinafter
“provided.”

There is an interlineation there in which the following language is stricken out: “and such shares of stock to be transferred on the books of said company to said trustee so as to vest the same in said trustee.” I will explain that. My understanding of it is that this agreement was presented in this way pretty nearly as a finality, after a lot of preliminary arrangement had been wiped out of the way and we had got down to a place where we were pretty close to the end of it, and I objected to this clause being in there and wouldn’t agree to it. I objected to the title being placed in the trustee, because I didn’t consider we were placing title in the trustee’s hands, nor anything else except a mortgage. Referring to Subdivision B of paragraph 9 on page 6, the paragraph reads as follows: “All of the capital stock of said Coos, Roseburg & Eastern Railroad & Navigation Company placed in the hands of said trustee and all of the bonds of said company placed in the hands of said trustee;” and referring to the interlineation by which there had been stricken out from that paragraph: all “duly endorsed,” I state that it was stricken from the agreement at my objection and at my suggestion, because I objected to endorsing the shares that remained in my name—made me a director. I objected to the delivering over by endorsement of my shares of stock because I didn’t consider that I was separating myself from them permanently, but only as collateral to this note, and I didn’t want to take them back with Mr. Spreckels’ permission when the thing

was ended. In Subdivision B of paragraph 10 it is provided that: "all of the capital stock of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company placed in the hands of said trustee and all of the bonds of the company placed in the hands of the trustee," and there has been stricken out of the language: "all duly endorsed." That language was stricken out at my request and suggestion, for the reason that I didn't consider that I was giving up the ownership of this property. I was advised by my counsel, Judge Garber, during the negotiations and prior to the filing of this instrument as to what the nature of the instrument was, as to whether I was forfeiting my title to the property. I was advised by Mr. John Garber on every step that I took in reference to the matter. He advised me that this instrument constituted a mortgage, before I signed it. During these negotiations the Spreckels knew of the source from which I was going to get the money to pay the \$550,000; they were very familiar with that fact. I informed them the money was to come from the Southern Pacific Railroad.

"MR. DUNNE: Won't you have him specify who it was of the Spreckels Company that he made that statement to?

Q. Yes, kindly do so.

A. I don't understand that the question is—that the answer is responsive to any question that you asked me during these particular negotiations.

Q. Well, did you notify them, and if so, whom?

A."

For three years before any hostilities broke out be-

tween Spreckels and I we were continually carrying on negotiations with the Southern Pacific Company; Mr. John D. Spreckels and Mr. Adolph Spreckels—Mr. A. B. Spreckels, I should say—had many conferences with me as to the policy that we should direct towards our dealings with the Southern Pacific. On one occasion Mr. A. B. Spreckels was designated by us, by Mr. John D. Spreckels himself, and me—to go to the Southern Pacific office with the proposition which I think he did, but I am not sure. All the time that we were operating in this road we had the Southern Pacific in view continually. Mr. Samuels here and I, had many conferences as to putting up the proposition to the Southern Pacific in a light that would be most interesting to them. The instrument was actually signed, according to my memorandum book, Mr. Spreckels signed it on the ninth of June, and I signed it on the twelfth of June in the building of the Bank of California. At the time I signed that instrument I did not believe that I was transferring any title to my property in case I failed to make this payment. If I had believed that at the end of six months if I failed to pay that I was going to lose all control and ownership over my property I would not have signed it. After the agreement dated June 8, 1899, was signed, I took up with Mr. George Crocker, then a member of the Board of Directors of the Southern Pacific Company the matter of carrying out the agreement. I had my conference with him in his office, a day or two after the signing of the instrument. He said, with reference to this property, that he had heard of it and he would look into it, but that he

didn't feel that he knew enough about it just at that time to talk about it intelligently. I think it was the next day that we were to have a further meeting. I went into the office to talk with him but he didn't seem very friendly, and not very anxious to talk. He said to me: "I don't think we want to go into that. The Southern Pacific is pretty well fixed up in a lot of things and while this is Mr. Huntington's matter more than anyone else's, if he wants to carry it out he should carry it out; but my main object in refusing it is because Mr. Preston has been in here and spoke to me about it, and he told me if we buy this road from you we are only buying a lot of law suits; if we stay out of it we will get the property cheaper later on." He didn't want to discuss it any further. I then went across the street to Mr. William H. Crocker, his brother, who I was very much under obligations to for big debts that I owed him and I explained to him that the conditions were such that if the Southern Pacific didn't carry out the original understanding, if it was going to be blocked by Mr. George Crocker, his brother, that his bank was going to probably suffer, and that as he had just as much interest in the Southern Pacific, I didn't think that he ought to stand by and let Spreckels' lawyer, Preston, block a game that meant so much to us all. Mr. Crocker gave me a letter, just wrote on a card or the back of an envelope, to his brother George Crocker to go into this matter further with Mr. Graham. Graham was a customer of the bank and they were much interested in it. I went back with that letter: not more than an hour or two had elapsed between the

time that I left his office until I went back again, and I sent this letter in to Mr. George Crocker with his secretary who came out and met me at the door. Mr. Crocker called me in and sent for Mr. Kruttschnitt. Mr. Kruttschnitt was the general manager of the Southern Pacific Company. Mr. Kruttschnitt said yes, that he had many times heard of it and had heard the matter discussed and had discussed it with me, and Mr. George Crocker asked him if he had any idea of how a plan could be arranged that would suit the Southern Pacific and be of any benefit to them. Mr. Kruttschnitt said yes, that they had made many such arrangements in Texas and other places where they had side lines built and feeders built to where they could get cheap fuel and traffic, and that it was a very good arrangement to guarantee the bonds as to principle and interest so that they would find a good market, and not load the road down with securities that had been sold at a discount, and that he thought the arrangement could be very well made. This conference occupied an hour or so. Subsequent to the conversation with Mr. George Crocker in which the conversation relative to Mr. Preston's action had taken place, I made an effort to bring that to the attention of Mr. Spreckels. I saw Mr. Samuels, a member of the Spreckels firm. He came over to talk to me about when it would be convenient for the directors—for those men who were designated as directors to come up to Oregon—and I told him that I was quite uncertain about it, as Preston was knocking us with the Southern Pacific. I can refresh my memory as to these conversations I have been testifying to by

reference to my diary. After I informed Mr. Samuels of this, he said Preston would have to stop knocking; said he no authority to talk about things of that kind. I will turn to my diary and refresh my memory as to these conversations. I have a memorandum in my diary, June 16, 1899:

“ In the office; was told by Crocker, Preston
“was knocking.”

On Saturday the 17th:

“ In the office. Samuels called at noon. He
“said Preston should quit.”

The next day I started up to Marshfield. I got back to San Francisco, August 8th. On August 9th I have a memorandum in my diary here:

“ In Frisco all day. Met Pierce.”

Mr. Pierce was Mr. Spreckels' lawyer. He was one of the attorneys in the litigation just had in Judge Barr's Court. The W. L. Pierce designated in the agreement of June 8, 1899, who was put on the Board of Directors is the same Mr. Pierce. My conversation with Mr. Pierce was on August 9th. The memorandum in my diary says:

“ In Frisco all day. Met Pierce, Spreckels'
“lawyer. He asked me when I would call the
“meeting and finally close the agreement. I told
“him I would close nothing, as Preston was knock-
“ing my plans with the Southern Pacific.”

I had another conversation with Judge Pierce on Friday, the 18th of August. My memorandum says:

“ Met Deering at nine thirty, about the Chicago “Agreement.”

That was a separate one, had nothing to do with this.

“ And afterwards met Henry Crocker. Seen “Pierce; told him Preston was knocking. They “all could go to hell and fight. There would be “no meeting called for directors until they quit “fighting.”

After this the next time I saw Mr. Huntington was in New York sometime after that. I have a memorandum here, on Wednesday the 30th:

“ Left at six P. M. for Chicago. Left every- “thing in good shape.”

That was in 1899. At the time I was talking with Mr. Pierce and others the provision of this contract that we were discussing was with relation to the fact that they wanted to have a meeting called of the Board of Directors of the Coos Bay Railroad to elect those three members, four members that had been agreed upon, Samuels, Chandler, Hazzard and Pierce. I refused to do anything about it at that time because as long as they were going to keep on fighting with the Southern Pacific Railroad Company, which was the only market I had in view, to get this money to pay them off with. I preferred to have them fight from the outside instead

of the inside. The next time I saw Mr. Collis P. Huntington relative to this matter, according to my memorandum here, was November 7, 1899. After my arrival in New York I had an interview with Mr. Huntington in which I took this proposal with him regarding the Coos Bay Railway. But I haven't any memorandum of it in my diary. The first memorandum I have of having seen Mr. Huntington after this agreement was signed was on the 7th of November. I know I had a conference with him prior to that time, but I haven't got any memorandum of it. I know that a day or two after I reached New York I went to see him; I talked with him. I reached New York September 11th. It must have been a day or two after I arrived that I met Mr. Huntington, because I sailed from New York within a few days, for England. I sailed for England after the instance of Mr. Huntington. When I met Mr. Huntington I told him about having finally signed an agreement with the Spreckels people, getting the six months, and that carried us over to the 8th of December. I told him about having seen Crocker and he said: "Yes, Crocker is not friendly to you." I says: "I think he is friendly now." He says: "Well, I don't think so; he hasn't so reported to me; on the contrary, he is very troublesome; anyway things has come around with us here in New York that we are all very busy and we have got a great many things of our own." They were refinancing the Southern Pacific on the basis that it is on now. He said: "You had better go to London and see Speirs who is doing our financing over there, and we can probably get him to take up

yours." I went to London with a letter from Mr. Huntington to Mr. Speirs, Sir Edgar Speirs. I left New York on September 20th on the steamer "Oceania" for London. I was not able to finance it in London. I went from London at Mr. Speirs' request to Frankfort-on-the-Main; from there to Munich in Bavaria to see another member of the Speirs firm there. I came back to London and didn't do anything, and came home to New York without having done anything. On my return to New York I saw Mr. Huntington. I have a memorandum in my diary about seeing Mr. Huntington: "I went down town and called on Huntington. He told me I would have to retire Spreckels' opposition; that they were making"—something—"on me through George Crocker." I don't know what that is there. The next day I saw Mr. Huntington. I had conferences with other persons than Mr. Huntington. Mr. Huntington introduced me and came with me to the office of Mr. Russell Sage. I have an entry in my diary relative to those meetings. The entry is, on November 15, 1899:

" I stayed at the hotel until twelve A. M., went "down town; seen Huntington at two. We went "together to the office of Russell Sage and was "able to see him at his house that evening."

The next entry is on the 15th:

" Got to the hotel at two thirty A. M. Had "a tough night, arguing with Russell Sage and "C. P. H. over the Coos Bay road. Sage agreed "to take a million of the bonds if we would take

“the balance.” I have an entry on Friday, November 17th, 1899, as follows:

“Huntington promised Sage he would try to have the S. P. take the balance, but George Crocker was obstreperous and friendly to Spreckels. I wanted Sage to take the present six hundred and twenty-five thousand of the bonds.”

The memorandum which I have correctly states the substance of the conversation which took place. After these interviews and prior to the expiration of the six months, provided for in the agreement of June 8, 1899, I wrote a letter to the Bank of California, the trustee, named in the agreement. Prior to my going to New York I called at the Bank of California after my interview with Mr. George Crocker in which Mr. Preston's attitude was discussed. That was on Monday, the 28th of August, 1899. I have a memorandum of it as follows:

“In town all day. Notified Brown of the Bank of California not to deliver any papers to Spreckels on account of agreement in escrow, as they were fighting me with the Southern Pacific through their attorney Preston, preventing my selling the bonds. Brown was cashier of the Bank of California and is now dead.”

The letter I wrote to the Bank of California when I was in New York was towards the end of November. I did not keep a copy of the letter. It was my custom while away to keep copies of letters and send the copies

and memorandums or anything that I had to the office at Marshfield, so they might be taken care of and filed. I have been of the impression ever since that I wrote, that I sent a copy of the letter, I kept the copy of the letter and sent it to the Marshfield office. When they took the road over by force they took the office and they took the letters and papers and correspondence. I have never had possession of any of the papers since. At the time I signed the agreement of June 8, 1899, the property and securities which were included by me in that instrument on which J. D. Spreckels & Bros. Company had at that time no lien whatever were the balance of the railroad stock consisting of 9,992 shares. I think, because I think by the agreement there were seven shares held out. Otherwise it would be 9,999. There was an insurance policy; an insurance policy and the Beaver Hill Coal Company stock. The Beaver Hill stock was then in their hands as collateral, but it wasn't in the note. My rights to the Klondike spur or railroad weren't in that agreement. Prior to that time I had never had any agreement of any kind with Spreckels by which he was to have any interest in it. As to its value at the time it was put in the agreement, if it were cut off from the Coos Bay railroad it wouldn't have much value, but it cost about thirty-five to forty thousand, fifty thousand dollars, along there, close to fifty thousand dollars. I think I have confused that question of yours by saying thirty-five or fifty thousand dollars. I am of the opinion that twenty thousand or twenty-five thousand would be the extent of the value of the spur.

MR. DUNNE: To what paragraph of the agreement of June 8, 1899, have you reference? I don't seem to find any reference to the Klondike spur in that agreement. It is barely possible it may be there and it has escaped me, but that is my impression.

MR. McNAB: My impression is there is a certain waiver of rights in that.

MR. DUNNE: I think you will find, Mr. McNab, there is a reference to it at page three under the sixth paragraph, subparagraphed.

MR. McNAB: Yes, thank you.

“ A release executed by the first party releasing
“and discharging the said Coos Bay, Roseburg &
“Eastern Railroad & Navigation Company of and
“from any and all claims and demands which he
“may now have or claim to have against said Com-
“pany; also a disclaimer of all right, title or interest
“in or to any of the property of said Company in-
“cluding the equipments and rolling stock of the
“railroad, and the spur tracks to the mine of the
“Beaver Hill Coal Company, and to the mine of
“the Beaver Coal Company, the same being known
“as the ‘Klondike Mine.’ ”

(Witness continuing:) That is the one to which I refer.

Mr. McNAB (Continuing): “Said release
“and disclaimer not to take effect, however, except

“upon the failure of the first party to pay or cause
“to be paid to said trustee, for the use and benefit
“of the second party, said sum of \$550,000.00 gold
“coin of the United States, as hereinafter pro-
“vided.”

(Witness continuing:) At the time of the execution of this instrument, I do not know how many instruments were executed, seven or eight. At any rate they were all signed up at the same time. I signed them at the same time, in the Bank of California. At the time I signed those instruments, I did not sign them on any other understanding than that they were to be dependent upon this six months provision in this contract. That is the only understanding that I had; that is there was no instrument of any kind signed by me with any understanding that it was to be delivered. If any instrument was delivered it was delivered without my knowledge. There was never any consent or protest about it. I don't remember a discussion even on the subject. I do not recall that I ever had any discussion that any instrument was to be delivered under that. The instrument which has been introduced in evidence provides that there shall be delivered to me a release by the Coos Bay, Roseburg & Eastern Railroad & Navigation Company of all of its claims of every kind and demand against me. I never received any such release from the Bank of California or any other person; I never received any such paper. In the suit which I brought against the Coos Bay Railroad for wages a receipt reading as follows: “I hereby acknowledge due receipt of the satisfaction of judgment here men-

tioned January 5, 1900, R. A. Graham," has been referred to. I was in the Bank of California about that date. They had taken this road over by this process of theirs which we call force, and I went up to Judge Garber to see what our position was in the matter. I am now alluding to the litigation that was started here, in which I was charged with having misappropriated \$100,000 or something. I cannot recall whether I had the papers before me or not, but I had knowledge in some way or another that they were suing me for a sum of money approximating \$80,000 or \$90,000. I do not think at that time any papers had been served on me. I happened to go to the Bank of California because Mr. John Garber told me that I was quite mistaken, that there wouldn't be any such litigation as that; that they would not sue me for \$80,000 or \$90,000 because the agreement provided that I didn't owe the railroad company anything. He said: "You go down to the Bank and see the papers or get them."

It was in connection with the following release that I was discussing the matter with Garber:

" And said trustee shall at the same time deliver to the first party (that's you) said satisfaction of said judgment entered in said suit mentioned in paragraph Numbered Four of this agreement; and the second party shall cause said Coos Bay, Roseburg & Eastern Railroad & Navigation Company to execute and deliver to the first party a release and discharge of any and all claims and demands which it may have or claim to have against the first party."

At the Bank I saw Mr. Smith, who had been the same officer of the bank who was in attendance during the signing of the negotiations; I told him what I wanted and he brought out a book. He says: "I want a receipt for this Mr. Graham." It seems to me that I had to sign on a very small margin of the page of the book. I did sign, and then he handed me a paper. I says: "Where is the rest of it?" He says: "That is all I have got." I looked to see what this was, and while it was not what I wanted, I felt rather put out about it and I said: "Well, this ain't what I wanted, I am not going to take it." "Well," he says, "that is all I have got." "Well," I says, "this agreement requires you to deliver me a release from the Coos Bay Railroad Company, and these people are now suing me in Oregon, I understand, for eighty or ninety thousand dollars, and that is why I want it. And I want it now if I am going to take anything." He says: "Well, I haven't got it, but I will try and get it for you. If we have it we will give it to you." I handed him this book back. I didn't make any change as to my signature on the receipt that I had given. I didn't try to obliterate that, and I let it go at that, and went back and told Judge Garber that I didn't have it; that they didn't have it—told him what I had done. And I have never gotten it since. I never received any papers of any kind from the Bank of California under this agreement; not a thing. I never received the satisfaction of the judgment for five hundred and twenty-three thousand and odd dollars. I never received anything of value or otherwise from the Bank of California, or from Spreckels, in regard

to this agreement; not one scrap of anything. When I went to the Bank of California and talked to Mr. Smith I told him that I desired to take these instruments upstairs to talk with Mr. Garber about them. Mr. Smith told me early in the discussion that he couldn't give them up without a receipt. Relative to the other provisions I never received any papers of any kind. I only signed one receipt. I do not make any dispute of the fact that I signed some receipt there. But I do say that I did not receive any papers under it. I state that I did not take away with me the satisfaction of judgment which I receipted for in the margin here.

(MR. FENTON: One of the counsel for defendants hereupon showed to the witness what purported to be a copy of the receipt signed by the witness at the Bank of California, being the same copy which was introduced in evidence in the prior litigation between the same parties, and Mr. Graham thereupon acknowledged that this was a true copy of the receipt given to the Bank of California to the best of his recollection. This receipt is contained in the deposition of Mr. Moulton and will be referred to and set forth hereinafter when the substance of Mr. Moulton's deposition is set forth herein.)

To my knowledge there never were transferred or issued during the life of this agreement to William L. Pierce, J. W. Bennett, Frederick S. Samuels, W. S. Chandler, S. H. Hazard, R. A. Graham or Thomas R. Sheridan any shares of the capital stock of the Coos Bay Railway. To my knowledge there never was called

any meeting of the Board of Directors of the Coos Bay, etc., Railroad Company during the lifetime of this agreement. To my knowledge the resignations of the directors referred to in Paragraph 7 of the agreement were never delivered. About this time I became involved in further litigation with defendants J. D. Spreckels & Bros. Company. They commenced this suit in January. Returning to the year 1899, and before the six months agreement was entered into, I think there was commenced an action against me and the Coos Bay, Hassett and Sheridan, by J. D. Spreckels & Bros. Company seeking the appointment of a receiver to take charge and control of the railroad.

(Counsel for plaintiff offers in evidence the Complaint in the action of J. D. Spreckels & Bros. Company, a corporation, Complainant v. Coos Bay, Roseburg & Eastern Railroad & Navigation Company, a corporation, R. A. Graham, J. B. Hassett and T. R. Sheridan, defendants, commenced in the Circuit Court of the United States for the District of Oregon, and marked as filed in this Court on January 9, 1899.

MR. McNAB: That was filed January 23, 1899. I offer it for the purpose of showing that an action was brought of that nature, for the purpose, of course we allege, of embarrassing the plaintiff. This action is the one alluded to in the contract of June 8, 1899, as being dismissed.

MR. DUNNE: The suit referred to in the agreement of 1899 was a receivership suit brought by Graham himself against the Beaver Hill Coal Company. Second,

was a suit brought by the Beaver Hill Coal Company against Graham. The third was this receivership suit brought against the Coos Bay, Roseburg & Eastern Railroad & Navigation Company by J. D. Spreckels & Bros. Company. That is the third suit mentioned in the settlement of June 8, 1899.

MR. McNAB: One was commenced by Graham against the Beaver Hill Company in Oregon, June 7, 1898; and following that, was the foreclosure suit in San Francisco, followed by the Beaver Hill Coal Company suit against Graham, concerning which I will ask this admission from you gentlemen: That there was commenced in San Francisco June 17, 1898, an action entitled: "Beaver Hill Coal Company vs. Robert A. Graham," the relief prayed for being an accounting, and containing the allegations referred to in the newspapers this morning as "misappropriation of funds," and the like.

MR. DUNNE: Well, we will stipulate that such a suit was brought, and brought at that date, subject to correction as to the date; and that it was a suit in which he was charged with misappropriating moneys.

MR. McNAB: That suit was commenced June 17, 1898. The third suit was the action commenced in the Circuit Court of Oregon; that is the one I just referred to. The Graham suit was commenced in Coos County, Oregon, on June 7, 1898.

(Witness continuing:) The action which has just been referred to as having commenced on June 7, 1898,

was for the purpose of getting a receiver for the Beaver Hill Coal Company. I regarded it as necessary to commence the suit because they had shut down the mine, and would not work it, and were keeping a big crowd of men standing around there at great expense, not doing any good to anybody; my idea was to have a receiver appointed so the court would work it.

MR. McNAB: We come now to the second group of cases. The first case in the United States Circuit Court of Oregon was commenced January 8, 1900. It is judgment roll 2933. It is entitled, *J. D. Spreckels & Bros. Company v. The Coos Bay, etc., Railroad and its various directors.*

The second case was entitled: *Farmers' Loan & Trust Company v. Coos Bay, etc., Railroad Company and others.* It is judgment roll No. 2934. It was commenced April 17, 1900. That completes the list of cases, your Honor.

(Counsel for plaintiff offers in evidence the bill of complaint filed in the first of this second group, in the case entitled: "In the Circuit Court of the United States, being Judgment Roll in this court, No. 2933—*J. D. Spreckels & Bros. Company v. The Coos Bay, Roseburg & Eastern Railroad & Navigation Company and many others.*")

(Counsel for plaintiff offers in evidence the answer filed by the defendant Graham on August 6th, 1900.)

(NOTE:)

(The complaint and answer are not made a part of this Statement of Evidence, but may be found in the Judgment Rolls accompanying the Record.)

(Witness continuing:) Mr. C. M. Idleman and Senator Mitchell were my attorneys in that suit. At the time this answer was filed and verified by me I did not understand it contained a statement admitting that the complainant owned 20,000 shares of stock in the Coos Bay, etc., Railroad. I did not discover that such an admission was in this answer until McNab told me, last year, in the summer of last year, October. My attention was also called that in the same paragraph I denied that they were the owner of any of the bonds of the railroad. I did not know that it was in at the time I signed it. I read over its provisions with Senator Mitchell. At that time I was making claim to the ownership of all the stock as well as to the bonds of the railroad; that was my understanding and intentions. If I had known any such provision was in there I would not have signed or verified it. In the signing of that answer I had no knowledge concerning any admissions there as to the ownership of stock being in Spreckels in the same paragraph in which it is alleged that I am owner of all the bonds; I never seen it or noticed it. I would never have signed any such admission or pleading had I known that it was in there; I certainly would not have signed it. I had no knowledge as to how it got there, and I didn't know it was there until Mr. McNab drew my attention to it. At that time I thought I was

asserting my claim to the stock of the railroad as well as its bonds. I was doing it in every way that I could. I had never any other idea but what I owned the stock and the bonds subject to this claim; and why it was put in there I have no knowledge. I mean subject to the \$550,000 claim set forth in the agreement. There is pleaded in the answer in this case an offset or counter-claim against my demands to the extent of the judgment procured against me in that foreclosure suit in San Francisco for \$523,000 and odd dollars with interest. I am willing that that should be considered and paid by me, with interest during the period of time that the court should adjudge it to be due. I am not seeking to avoid the payment of the money which may be due by me, nor am I seeking to set aside the judgment.

(Counsel for plaintiff offers in evidence the complaint in the action entitled: Farmers' Loan & Trust Company v. The Coos Bay, Roseburg & Eastern Railroad & Navigation Company, filed April 17, 1900; also petition of Robert A. Graham for leave to intervene in said action, for the purpose of showing that the defendant Graham was setting forth and reasserting all his rights to the stocks and bonds, and for the purpose of showing due notice to the Southern Pacific Company.

(NOTE: The bill of complaint above offered, found in Judgment Roll No. 2934; and the petition of R. A. Graham to intervene, page 464, are not made a part of this Statement of Evidence, but is made a

part of the record hereof and may be found in the Judgment Rolls accompanying the record.)

(Counsel for plaintiff offers in evidence order of court permitting defendant Robert A. Graham to intervene in said action.)

(Witness continuing:) That is my signature on the stipulations on file in Judgment Roll No. 2933.

(The stipulation is as follows:)

“ It is hereby stipulated, consented and agreed
“that the answer interposed herein by the defend-
“ant Robert A. Graham be withdrawn, and that the
“complainant may have judgment as prayed for in
“the complaint, except the relief prayed for in the
“third division of the prayer of said complaint to
“the effect that judgment be entered in favor of
“the defendant, Coos Bay, Roseburg & Eastern
“Railroad & Navigation Company against the de-
“fendant Robert A. Graham for funds alleged to
“have been improperly diverted by the said Graham
“from the said railroad; and that such judgment be
“entered without costs as against the defendant
“Robert A. Graham, and without further notice.
“Dated, New York, February 8, 1905. R. A.
“Graham, Defendant, Williams, Wood & Linthi-
“cum, Solicitors for the Complainant.”

“ THE COURT: What is the date of that
“stipulation?

“ MR. McNAB: That is dated February 8,
“1905.”

(Counsel for plaintiff offers in evidence stipulation in the next action, filed July 19, 1907, as follows:)

“ Dismissal. Now, at this time, the complainant, “by Williams, Wood & Linthicum, its solicitors, “moves the court that the bill of complaint filed “in this cause be dismissed.”

MR. McNAB: It will be shown that this was a stipulation pursuant to a settlement entered into between the parties in this litigation, of all these matters, and that this stipulation was sent forward, but never was acted upon, and instead of any judgment being taken in the case, that the actions were dismissed.

(Counsel for plaintiff offers in evidence stipulation signed by defendant Robert A. Graham in the other action, Judgment Roll No. 2934, to be found at page 524 of the Judgment Roll as follows:)

“ (After title of court and cause.) It is hereby stipulated, consented and agreed that the petition of intervention interposed and filed herein by “Robert A. Graham on or about the 4th day of “October, 1904, be withdrawn, and that an order “dismissing the said petition of intervention on the “merits, without costs against the petitioner Graham, may be entered accordingly.”

(Stipulation dated February 8, 1905, signed R. A. Graham; Turner, Rolston & Horan, and Williams, Wood & Linthicum, Solicitors for Complainant; filed March 24, 1905.)

(Counsel for plaintiff offers in evidence dismissal of petition of intervention pursuant to the stipulation, found at page 528 of the Judgment Roll.)

“ March 24, 1905. Now at this day comes the
“complainant herein by Turner, Rolston & Horan,
“and Williams, Wood & Linthicum, its solicitors,
“and presents to the court the stipulation of Robert
“A. Graham withdrawing his petition of interven-
“tion heretofore filed in this cause, and consenting
“that an order be made herein dismissing said peti-
“tion of intervention. It is therefore ordered, ad-
“judged and decreed that the petition of interven-
“tion heretofore filed by Robert A. Graham be and
“the same is hereby dismissed and stricken from the
“files of this court, without costs to either party.”

(Counsel for plaintiff offered in evidence consent of J. D. Spreckels & Bros. Company, on page 279 of the Judgment Roll, for the dismissal of the action and discharge of the receiver, dated and filed July 19, 1907, as follows:)

“ (Title of court and cause.) J. D. Spreckels
“and Brothers Company, a corporation organized
“and existing under and by virtue of the laws of
“the State of California, sole creditor upon open
“account of W. S. Chandler, receiver of the de-
“fendant Coos Bay, Roseburg and Eastern Rail-
“road and Navigation Company, hereby consents to
“the dismissal of the bill of complaint filed by the
“Farmers' Loan and Trust Company in this cause,
“and expressly consents that the accounts of W. S.

“Chandler, as receiver of the Coos Bay, Roseburg
“and Eastern Railroad and Navigation Company,
“shall be deemed and considered closed, and as the
“sole creditor upon open account of such receiver
“hereby waives the examination of the accounts of
“the receiver by a master or examiner appointed
“by this court, and further waives the filling of any
“additional or supplemental reports by such re-
“ceiver, and waives all claim against such receiver
“and the property of the defendant in such re-
“ceiver’s possession.

“ JOHN D. SPRECKELS & BROS. CO.,

“ John D. Spreckels,
“ President.

“(Seal.) Fred’k S. Samuels, Actg. Secty.”

MR. McNAB: It is our contention that these stipulation were all entered pursuant to a subsequent agreement which was entered into between Mr. Graham, the Southern Pacific Company, and the J. D. Spreckels & Bros. Company.

(Counsel for plaintiff offers in evidence consent of the Southern Pacific Company, on page 282 of the Judgment Roll No. 2934, signed by its Vice-President and General Manager, and its Assistant Secretary, filed July 19, 1907, in the Circuit Court, which is as follows:)

“The Farmers’ Loan & Trust Company, Complain-
“ ant,

“ vs.

“Coos Bay, Roseburg & Eastern Railroad & Navi-
“ gation Company, et al.

“ The Southern Pacific Company, a corporation
“organized and existing under and by virtue of the
“laws of the State of Kentucky, owner of the en-
“tire capital stock and all of the first mortgage
“bonds of the defendant Coos Bay, Roseburg and
“Eastern Railroad and Navigation Company, now
“issued and outstanding, hereby consents to the dis-
“missal of the bill of complaint filed by the Farmers’
“Loan and Trust Company in this cause, and ex-
“pressly consents that the accounts of W. S.
“Chandler, as receiver of the Coos Bay, Roseburg
“and Eastern Railroad and Navigation Company,
“shall be deemed and considered closed, and as such
“sole stockholder and bondholder hereby waives the
“examination of the accounts of the receiver by a
“master or examiner appointed by this court, and
“further waives the filing of any additional or sup-
“plemental reports by such receiver.

“ SOUTHERN PACIFIC COMPANY.

“ By E. E. Calvin, Vice-President and
“ General Manager.

“(Seal.) Assistant Secretary.”

(An adjournment was here taken until tomorrow,
April 19, 1916, at 10 A. M.)

PORTLAND, OREGON, APRIL 19, 1916,
AT 10 A. M.

(Direct Examination of R. A. Graham resumed:)

THE WITNESS (continuing): That is my sig-
nature to the stipulation in the case entitled: The

Farmers' Loan & Trust Company v. Coos Bay, Roseburg & Eastern Railroad & Navigation Company. The stipulation in this case and the stipulation in the other case, commenced by J. D. Spreckels & Bros. Company, are the same date, February 8, 1905. I signed them in New York.

(Counsel for plaintiff reads stipulation and Judgment Roll No. 2934 as follows:)

“ It is hereby stipulated, consented and agreed
“that the petition of intervention interposed and
“filed herein by Robert A. Graham on or about
“the 4th day of October, 1904, be withdrawn, and
“that an order dismissing the said petition of in-
“tervention on the merits, without costs against
“the petitioner Graham, may be entered accord-
“ingly.

“

R. A. GRAHAM.

“ Dated February 8, 1905.”

Signed by Turner, Rolston & Horan; Williams, Wood & Linthicum, Solicitors for the plaintiff. Filed in this court March 25, 1905.

(Counsel for plaintiff offers and reads in evidence judgment of dismissal, filed July 19, 1907, made and signed on that day by Judge Wolverton, as follows:)

“ (Title of Court and Cause). Action No.
“2616: Now at this time the complainant, by
“Turner, Rolston & Horan and Williams, Wood &
“Linthicum, its Solicitors, having moved in open
“court that the bill of complaint as amended filed

“by the complainant in this cause be dismissed, without costs and without prejudice; and it appearing that this cause has heretofore been dismissed as to the defendants Z. T. Siglin, J. H. Nosler, T. R. Sheridan, Eugene O’Connell, J. T. Nosler, administrator of the estate of Matilda E. Nosler, deceased, and Beaver Hill Coal Company, and the answer of the defendant Flanagan & Bennett Bank, a corporation organized under the laws of the State of Oregon, substituted for J. W. Bennett and James Flanagan, administrator of the partnership of Flanagan and Bennett, having by stipulation, on file herein, been withdrawn, and J. D. Spreckels and Brothers Company, a corporation organized and existing under and by virtue of the laws of the State of California, sole creditor upon open account of W. S. Chandler, receiver of the defendant Coos Bay, Roseburg and Eastern Railroad and Navigation Company, and Southern Pacific Company, a corporation organized and existing under and by virtue of the laws of the State of Kentucky, owner of the entire capital stock and all of the first mortgage bonds of the defendant Coos Bay, Roseburg and Eastern Railroad and Navigation Company, now issued and outstanding, having severally by written consent filed in this cause consented to the dismissal of said bill of complaint, and having severally expressly consented that the accounts of W. S. Chandler, as receiver of the Coos Bay, Roseburg and Eastern Railroad and Navigation Company, shall be deemed and con-

“sidered closed, and having severally waived the
“examination of the accounts of the receiver by a
“master or examiner appointed by this court, and
“further waived the filing of any additional or sup-
“plemental reports by such receiver, and the costs
“of this court having all been paid, it is hereby con-
“sidered, ordered and adjudged that the bill of com-
“plaint as amended be, and the same is hereby dis-
“missed without prejudice, and W. S. Chandler,
“heretofore appointed by this court as receiver of
“the property of the Coos Bay, Roseburg and East-
“ern Railroad and Navigation Company, be, and
“he is hereby discharged from further duties as
“such receiver, and the bond of said receiver is here-
“by canceled and the sureties upon such bond are
“hereby exonerated, and the said W. S. Chandler
“is hereby directed to deliver over unto the Coos
“Bay, Roseburg and Eastern Railroad and Naviga-
“tion Company all and singular the property of
“such corporation in his hands as such receiver.

“ This order of dismissal is subject to the right
“of W. S. Chandler, Receiver, to apply to this court
“for an order fixing the compensation of such re-
“ceiver from the first day of July, 1906, to the
“date of this order; such compensation, if any, to
“be made chargeable against the Coos Bay, Rose-
“burg and Eastern Railroad and Navigation Com-
“pany; and is also without prejudice to the rights
“of any person who heretofore, by leave of this
“court, has been authorized to sue said receiver to
“continue such suits against the defendant, Coos

“Bay, Roseburg and Eastern Railroad and Navigation Company.

“Portland, Oregon, July 19, 1907.

“CHAS. E. WOLVERTON,

“Judge.”

MR. McNAB: Gentlemen, I believe your answer in this case admits that the sale to the Southern Pacific Company took place July 2, 1906.

MR. DUNNE: We will agree with you, of course, subject always to reference to the answer; but I think that is correct.

(Counsel for plaintiff offers and reads in evidence decree or judgment of dismissal, in Judgment Roll No. 2933, entered pursuant to motion made by Williams, Wood & Linthicum, filed in court July 19, 1907, moving the court that the bill of complaint filed in the cause be dismissed; also the judgment of dismissal signed by Judge Wolverton, dated July 19, 1907, as follows:)

“At this time complainant, by Williams, Wood
“& Linthicum, its solicitors, moving in open court
“that the bill of complaint filed in this cause be dismissed without prejudice, and it appearing that
“the demurrers of the defendants T. R. Sheridan
“J. W. Bennett, F. H. McLean, O. J. Seeley, J.
“B. Hassett and W. H. Trelease, filed by said respective defendants to the bill of complaint, have
“heretofore been sustained by this court, and that
“said bill of complaint has not been amended as
“to said respective defendants; and it furthermore

“appearing that by written stipulation of the re-
“spective parties filed herein the answer of the de-
“fendant R. A. Graham has been withdrawn and
“the defendant Coos Bay, Roseburg and Eastern
“Railroad and Navigation Company having, by its
“counsel, in open court consented to the dismissal
“of said bill of complaint; and it furthermore ap-
“pearing that by order of this court made in that
“certain suit filed by the Farmers’ Loan & Trust
“Company, as complainant, against the Coos Bay,
“Roseburg and Eastern Railroad and Navigation
“Company, et al., as defendants, W. S. Chandler
“originally appointed as receiver of the property
“of the Coos Bay, Roseburg and Eastern Railroad
“and Navigation Company, was in said other suit
“made receiver of the property and assets of the
“Coos Bay, Roseburg and Eastern Railroad and
“Navigation Company, and the receivership in this
“proceeding terminated; and it further appearing
“that in said other suit J. D. Spreckels & Brothers
“Company, as sole creditor of said receiver, and
“Southern Pacific Company, owner of all of the
“capital stock and all of the bonds of said railroad
“company, having severally consented in writing
“to the dismissal of said other suit, and that the
“accounts of said receiver should be deemed and
“considered as closed;

“ It is, therefore, considered, ordered and ad-
“judged that the bill of complaint, filed in this
“cause, be and the same is hereby dismissed with-
“out prejudice, and W. S. Chandler, originally

“appointed as receiver of the property and assets
“of said Coos Bay, Roseburg and Eastern Railroad
“and Navigation Company, is hereby discharged
“from further duties as such receiver, and the bond
“of said receiver is hereby canceled and his sureties
“on such bond exonerated, and the said receiver is
“hereby directed to turn over unto the Coos Bay,
“Roseburg and Eastern Railroad and Navigation
“Company all property of said corporation which
“has come into and now is in the possession of such
“receiver.

“ CHAS. E. WOLVERTON,
“(Dated July 19, 1907.) Judge.”

THE WITNESS (Continuing): I signed the stipulations above referred to. I will state the circumstances under which they were signed and the purpose for which they were signed. From 1902 until 1905 or 1906 I was continually in negotiations with somebody in New York in reference to this property. I first presented the matter to Mr. Harriman, as I had business with him in another direction. The object of presenting the matter to Mr. Harriman was to have him join in where the Southern Pacific left off—where Mr. Huntington had left off. Mr. Huntington died about the end of 1900, as I remember. My recollection is that Mr. Harriman came in connection with the Southern Pacific Railroad in the winter of 1901. Up till the early spring, April of 1901, I lived in Portland most of the time. At that date I went to New York and took a steamship matter up with Mr. Harriman, and also this railroad project. I gave Mr. Harriman

the profiles of the road to examine for his information, and I conducted some negotiations with him with a view of continuing on the negotiations with him that I had had with his predecessors about building this road through to Roseburg, where it was first intended to be built. There was a good deal of delay in the discussions with Mr. Harriman at that time, because he was contemplating building a road to Coos bay by way of Drain. I put in as much as two years at different intervals with him trying to divert his plans from the Drain road to the Coos Bay road. During these negotiations, and more particularly in 1904, I had many consultations with Mr. Couch Flanders, with the Farmers' Loan & Trust Company, trustees of those bonds, and with Mr. C. E. S. Wood, a member of the firm of Williams, Wood & Linthicum. I had seen Mr. Wood in New York many times and talked with him in connection with this matter. I saw Mr. Flanders as many as two or three times. Mr. Flanders and Mr. Wood both had conferred with my attorney in New York, Mr. Thomas D. Rambautt. During the year 1904 Mr. A. B. Spreckels was in New York; I had not talked with him, but he sent a man to me by the name of George Crouch, a broker on Wall Street, and a friend of Mr. Spreckels, and he conducted some negotiations with me, made some suggestions about settling up this matter and getting the thing settled. He justified himself in coming to me by saying that he had come from Mr. A. B. Spreckels, who was a friend of his and living together with him; at least they were both living at the Hoffman House in New York at the

time. Later on in the fall—I cannot fix the date—but in the fall of 1904—I met Mr. E. F. Preston in New York at the Waldorf-Astoria Hotel by appointment. He took the matter up also along those lines and suggested a settlement of all those claims so that the road, on the basis he put it, might be reorganized and put into shape so that everybody would get their money; and if I would agree to reorganization as he explained to me, that all the litigants in Oregon, or most of them, including Flannigan & Bennett and some others had been settled with, and a Mr. Baynes; and that the only litigation that was standing out and the only fight that was being made was by me; that we were not getting any place; that the Spreckels had changed their opinion somewhat—they didn't feel so antagonistic as they had previously done—and that he was satisfied that a settlement could be had if I would lead off by showing a disposition to forget the past and dismiss those proceedings. I talked frequently with Mr. Rambautt about it, and he said it was not the proper way to proceed without some kind of a written agreement, that we had so many written agreements—that as I was getting no consideration for the stipulation for signing it and drawing it up, he thought it might be done with safety. I had then been devoting most of my time for a good many years, and about all the money that I could accumulate to pay the costs of making these fights, and I was willing to take a reasonable chance on getting out of them with some kind of a decent settlement. If Spreckels could get anything out of the proceeds of the sale of the road, or the construction of it, or the

reorganization of it, I had myself persuaded, without any definite information, however, from Mr. Spreckels, other than those people that I had talked to, that I would get a square deal. For that reason I signed the stipulation, and Mr. Rambautt drew the stipulations up. I signed it in his office, in its proper form, as he said it was; and I sent it personally to Mr. A. B. Spreckels, I think it was A. B., and wrote a letter. I have no copy of it here. All of the papers that I have that didn't relate to this particular litigation, up till 1900, are in New York, in the custody of my former attorney in that case, Mr. Thomas D. Rambautt. Among them were some letters from Mr. C. P. Huntington, and about January of a year ago, on my way through New York, when I expected this suit was coming up, I called on Mr. Rambautt to get what papers and letters he had pertaining to this business out here. He said he would look them up. He has not reported to me that he found them, nor have I got them since. All of the papers and other records presented to this court in this case are papers that were deposited with Messrs. Garber & Garber in the proceedings had in San Francisco in 1898, and another which was that suit in Judge Bahrs' court—all of the letters that we had from Mr. Spreckels and some of our answers were taken by me from Marshfield and deposited with Messrs. Garber & Garber. After the litigation in San Francisco, and this complaint was filed here in 1900, and I had engaged Mr. Idleman and Senator Mitchell to represent me, all of the papers and documents that were in Mr. Garber's possession were sent here. I brought

them up here and deposited them with Messrs. Idleman and Mitchell. After Senator Mitchell died, the proceedings had a lull; they were revived by Watson & Beekman, and the papers were deposited with them. When I went to New York, Watson & Beekman were the custodians as I remember it of those papers. As this suit went along, papers were taken from time to time from Judge Watson's office; I think there are a great many of them there yet that were not considered useful in this suit; but nothing pertaining to anything since 1900. All of my files and records relating to all of the affairs, other than the papers produced here, and those which have been referred to on Judge Watson's office were kept in the head office at Marshfield, Oregon, the railroad office; they were there at the time this agreement of 1899 was expired, and they took them with the railroad and did everything else. Those papers include everything I had in the shape of papers, books and memorandums that I hadn't happened to have here with me, and that were not in Judge Garber's office. When I say "they took them" I refer to Mr. Chandler, I assume, who took the railroad over, the people that he represented. I have never had possession of those papers, or any of them, since Mr. Chandler and the people who were with him seized possession of the railroad and its offices. I have never had a paper that was in that office at the time they took it, which included all the papers, with the exceptions of an insurance policy that had expired. Within the last three years, I should say, some member of the Southern Pacific's office in San Francisco notified me that they had an

insurance policy in their hands in my favor; that they didn't know whether it had any value or not, but I could have it if I called. I called and they delivered it to me. It had no value; it had expired. That is the only paper I have any recollection of ever receiving or having in my possession since they took the road over, that was in their possession at that time. I have no knowledge as to whether those private records and papers and memoranda, which were in the office when seized by the receiver and others in this case were destroyed. The insurance policy which the Southern Pacific notified me about was among the papers seized by the receiver and others. Referring to the matter of signing these stipulations again: We came up to the signing of the stipulations, and they sent them out here to Mr. A. B. Spreckels. My recollection is that I addressed the letters myself to A. B. Spreckels personally in San Francisco, with this stipulation. There was nothing done or said about it for a few months. My negotiations from there on were of a very scattered kind. They were always conducted with Mr. C. E. S. Wood, whom I met in New York a great many times. At that time the only claim that I was pursuing against the railroad company was a claim for wages. We divided that up into two claims, one that we made a claim for wages from the beginning of the company's affairs until the end of my connection with the road in 1899; another suit was had at the same time with them, which carried us over from 1899 until that particular time, which as I remember was 1910. That suit never went to trial: the other suit, which was a demand for wages from the

commencement of the road to 1899 was tried in Coos County, and I was beaten.

MR. FENTON: Mr. McNab, this agreement of 1899 was pleaded by the defendant company as a settlement between Mr. Graham and the company.

MR. McNAB: Yes; but not passed on by the Supreme Court.

MR. FENTON: No; but the court below directed special findings and a general verdict, and there was a special finding that there was no contract of employment.

MR. McNAB: Yes, I have read the transcript very carefully. A number of witnesses testified to a type-written resolution; and there were some witnesses who testified that no notice had ever been received by Spreckles of any such contract; and the Supreme Court of Oregon went nicely around the contract and came back into the rivulet below.

“MR. DUNNE: The Supreme Court of Oregon held that the jury had made a special finding that the contract as alleged by Graham of employment never existed. The jury found against the contract and judgment rested upon that finding, and the Supreme Court found it, therefore, unnecessary to examine this agreement of settlement.

MR. McNAB: There is no dispute about it, Mr. Dunne, because the Supreme Court wrote a very elaborate and clear cut opinion, which is in the reports and I suppose has been read by all of us.”

THE WITNESS (Continuing): While these stipulations were under consideration, the position which I took with all of those people, including Mr. Wood, Mr. Flanders, Mr. Crouch, and Mr. Harriman, regarding the claims that I was urging and discussing relative to the stocks and bonds of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company and other properties described in the contract of June 8, 1899, was that Mr. Spreckles had had an interest in this property of \$550,000 with interest from the commencement, from the date of that instrument; that whatever other values were in the road were mine; and that whatever the road could be sold for, first Mr. Spreckels should have his money—\$550,000 and interest—and the balance of the money I claimed all the time was mine. I did have some personal interviews with Mr. E. H. Harriman relative to my claim of ownership of the stocks and bonds of the Coos Bay Railroad and other properties. I first commenced to have interviews with Mr. Harriman when I was in New York in the end of March or beginning of April, 1892. This matter was not the only matter I had up with him; only it was not discussed with Mr. Hariman at my first or second interview; it came gradually as we got acquainted. The first matter upon which I approached Mr. Harriman was the steamship matter, the Oregon and Oriental Steamship Company; it had five ships chartered. The next was in 1899 when I was over in London making an effort to finance this property before the termination of this agreement. I had a sawmill at Coos Bay known as the Porter Mill, which was run-

ning and in operation at that time. I wanted to convey the lumber from that mill to China and Japan; I chartered a steamer in London called the "Universe," for one year, with the privilege of two more years, for 1350 pounds a month, payable monthly in advance; the first payment to become due when the steamer was ready for delivery at San Francisco Bay in April, 1900. I first took up with Mr. Hariman the matter of my affairs with the Coos Bay, Roseburg & Eastern Railroad & Navigation Company in the early part of 1902 when I delivered him the profile,—that was in 1901. I had had the profiles made for the Coos Bay Railroad. We had four parties of engineers out there for a long time, and they cost me about \$20,000. I never lost possession of those profiles. I delivered them to Mr. Hariman about 1901 or 1902. He did not retain them more than a week. These profiles were never in the possession of John D. Spreckles. At Mr. Harriman's request I later, in 1904, gave them to Mr. Harriman again. The way I fix 1904 without any memorandum is that in May or June of 1904 I had occasion to go to England, and Mr. Harriman was on the steamer, also going to England; we probably had more detailed discussion on the way over on that trip than we had at any other time; it was agreed that when I came back I should submit to him the profiles again and the engineer's reports of the cost of the construction of the road from Myrtle Point to Roseburg, which I did do. I always asserted to Mr. Harriman and to Mr. Stubbs my claims against J. D. Spreckles and Bros. Company relative to my asserted ownership of the stocks and

bonds of the railway. I always asserted in many of the interviews that the only interest Mr. Spreckles had in this railroad or in this coal property was \$550,000 with interest, and the balance was mine. Mr. Stubbs was traffic manager of the Southern Pacific Railroad. Mr. Kruttschnitt, to whom I referred in my testimony yesterday, was the manager of the Union Pacific; he is now chairman of the executive board of directors of the Southern Pacific. I had this matter up with Mr. Stubbs two or three times. I delivered to Mr. Harriman the contract of June 8, 1899, relative to my interest in the Coos Bay, Roseburg Railroad; I delivered it to him at his request; I also delivered to him the profiles of the railroad.

(Counsel for plaintiff shows witness profiles of the survey from Marshfield to Roseburg.)

(Witness continuing): Upon being shown these profiles I state they are the profiles to which I alluded; these are the profiles which I delivered to Mr. Huntington's representatives in New York at Mr. Huntington's request; I got them back afterwards; delivered them to Mr. Harriman and got them back.

(Counsel for plaintiff offers in evidence, which are admitted by the court, the four profiles testified to by the witness; and which are marked: "Complainant's Exhibit No. 38.")

(Witness continuing): To my knowledge there never was any copy made of these profiles. The original of these profiles never passed into the possession

of John D. Spreckles; to my knowledge there never was any other survey made of that roadbed. I had negotiations with Mr. Wood relative to this matter in New York. Mr. Wood's firm at that time were the attorneys for John D. Spreckels & Bros. Company, and I think the Coos Bay Railroad. My claim to ownership of the stocks and bonds of the Coos Bay Railway was the subject of discussion between Mr. Wood and myself. My understanding of what I was to receive in case these suits were disposed of by these stipulations and the litigation ended, was that I was to receive everything that Mr. J. D. Spreckels Brothers Company could not claim under the agreement of 1899 with interest on \$550,000. There was a discussion at that time concerning the sale of the railroad. It was understood that it would probably be sold to the Southern Pacific. When Mr. Harriman got along in the negotiations he completely changed the plans along the lines suggested by Mr. Huntington. He said that they were going to have a road of their own to Coos Bay; that they were not going to have a road with a traffic agreement, somebody else owning it; that they were building early in those proceedings by way of Drain. I used a lot of discussion with him to persuade him that the Coos Bay Railroad route was a better route than the Drain route, (although they had started on it. Mr. Harriman's conclusion was and the gist of his discussions along the line, was not to carry it out on the basis of Mr. Huntington's, which was a traffic agreement. Mr. Harriman's discussion was to buy the property out,—the mines and everything else, and have it himself,—have

it for the Southern Pacific. When Mr. Harriman returned the profiles to me on the second occasion he said to me that he was taking the matter up with his people on the Pacific Coast. I never received anything for the signing of these stipulations. After the stipulations were sent out here, I discovered sometime in the fall of 1906—it was reported to me from Marshfield in a general way that the road had been sold out to the Southern Pacific. Subsequent to the sale to the Southern Pacific Railroad I had a discussion concerning my rights with Mr. Wood, who had been representing the Spreckels interests. I think I saw Mr. Wood in New York twenty times at the various discussions, and it always was with the view of a settlement, for him to bring about this settlement in some kind of a form that would be satisfactory; and I think it was as late as 1907 that he said to me: "These people won't settle with you. If you have got any claim, you have got to go and fight it out in the court." During the times I have mentioned, at the time of making the contract of June 8, 1899, and at the time the railroad interests of the Coos Bay Railroad were sold to the Southern Pacific in my opinion the value of that railroad that the road was worth at least \$30,000 a mile on account of its location and on account of the water terminal facilities at Marshfield, a practically exclusive use of all of the good water front; it was my opinion that it was a considerable equity in the stock after the part value of the bonds, which was \$625,000. As to the value of the land at Marshfield I never had any other opinion of the land than what I have formed from the prices we got for

the portions we sold from time to time during the construction of the road. I always had a valuation on the property of about \$200,000. Each of those lots was valued by us before we ever sold one in the early fall of 1890, when the survey was first made, and that valuation was put at about \$200,000. A considerable number of lots were sold on the price list that was made out at that time. The condition of the mine of the Beaver Hill Company at the time I turned it over was very good. I always thought I had an asset there equal to the par value of the stock, \$250,000. I put an estimate on the value of the stock of the Coos Bay Railroad of about \$25 a share; and on the bonds at par. I am not a citizen of the United States.

MR. McNAB: Will it be admitted that J. D. Spreckels Bros. Company is and at all the times named in this litigation has been a corporation organized under the laws of the State of California?

MR. HOHFELD: We admit it.

MR. McNAB: Will it also be admitted that J. D. Spreckels & Bros. Company, a corporation organized under the laws of the State of California, has not and never has had, during the pendency of this action or at any time, a managing agent under the statutes of Oregon, in the state of Oregon, upon whom service of process might be had, and so on.

MR. DUNNE: What is the object of it?

MR. McNAB: We think it has something to do with the case. I want to prove it before I conclude.

(Witness continuing): To summarize: I consider my equity in the Beaver Hill ought to be worth \$250,000; the bonds of the railroad at par; and the stock of the railroad at \$25 a share. Regarding steamships which were sold by the J. D. Spreckels & Bros. Company, included in this sale to the Southern Pacific, I know from reports I got from Mr. Samuels that they had bought her for \$30,000. I had heard Mr. Spreckels say that the other one was worthy seventy-five thousand dollars, the "Breakwater." Mr. Spreckels made those statements as a witness in San Francisco in a case that I think was known as the unmerger suit of the Union and Southern Pacific, in San Francisco about January, 1908. He was on the witness stand giving the value of the property; he said that the "Czarina" was worth fifty thousand and the "Breakwater" seventy-five thousand dollars. I first learned that the Coos Bay Railroad stocks and bonds had been sold to the Southern Pacific in the fall of 1906; at that time I was in New York. I think I heard it from letters I had from Marshfield from friends of mine; that the road was going to be built now; that the Southern Pacific had bought it out and had taken possession of it. The record of the court shows the removal from Coos to the Federal Court of an action which I commenced against the defendants in this case on December 7, 1907; the complaint is verified on December 2, 1907. I was in New York at the time. I saw Mr. Wood in connection with this suit, after it occurred, several times. That is the same Mr. Wood who was representing the interests of Spreckels in these various matters in New

York. I had conversations with him, and practically every conversation I had with him was relative to these matters. I also had a conversation with him after I had learned that the Coos Bay Railroad stocks and bonds had been sold to the Southern Pacific. At that last conversation I asked him what he thought the prospects were of getting this settlement, towards the spring of 1907. He said: "Well, I have talked with Samuels and Couch Flanders has talked with Samuels and they are not going to settle with you. They say you haven't got any claim and if you have a claim the best thing you can do is to get in and prove it." After I commenced that action I have been ready and anxious to proceed to trial. My attorneys were E. B. Watson, of Watson & Beekman. So far as I know there has been no delay in this case due to any action on my part. I have never asked for any postponements. I was present in this court during the year 1915 in an effort to have this case set for trial. Mr. McNab, my counsel, was present at the time. Prior to the time that Mr. McNab represented me, I was represented by Judge Pipes. My purpose in being here was to get the case set for trial; that was in the spring of 1915. There was objection by the other side against proceeding to trial. I had a discussion at that time with young Mr. Fenton, and he said that I had a right to have my case tried, but that he didn't think that they could be ready to try it before the autumn, before the fall. That his father was down on the coast and was not feeling very well and that he would stipulate with me to try it in the fall if we would wait, I think October. Later on I went and conferred

with Judge Pipes on the matter and he made some arrangement about it; young Mr. Fenton came into court here and my impression is now that the case was set for the second Monday in October in this court. At the time of the death of Mr. Watson there was no attorney familiar with the details of this case acting for me. I had never discussed the case with Mr. Watson's partner, Mr. Beekman. I took it up with my present attorney with the purpose in view of having the case tried. So far as I am concerned I never consented to any delays or postponements of this trial.

(Counsel for plaintiff offers in evidence papers or files among the proceedings of the case and covers of briefs filed for the purpose of showing they were filed at different periods; also the stipulation on file showing that counsel by agreement between them on account of the excessive length of the briefs, had it continued from time to time.)

(Witness continuing): Returning to the matter relative to my dealings with Mr. Huntington I received a letter from Mr. Samuels in regard to that matter. I have found the letter.

(Counsel for plaintiff shows witness letter.)

(Witness continuing): Upon being shown this letter I state that this is the letter I referred to in my former testimony. The date "1899" is not my memorandum. I do not know who put it there. My recollection is that I received this letter at the time we were entering into negotiations—that we were carrying on

negotiations—about the conclusion of this agreement of 1909. My recollection is that I received the letter during the carrying on of the negotiations or at the terminus of the negotiations of 1899; the same year and at the same time of the contract of June 8, 1899.

MR. McNAB: It will be admitted, of course, gentlemen, that the Southern Pacific is a railroad organized under the laws of Kentucky and with a managing agent in this state?

MR. HOHFIELR: Yes.

(The letter is admitted in evidence, marked: "Complainant's Exhibit No. 39"; and is as follows):

"San Francisco, Cal., Apr. 8.

"R. A. Graham,

"Palace.

"Dear Sir:

"I have the Payne and Hall reports if they are
"of any use to show Huntington and may also be
"able to be of service to you in getting data to-
"gether, and in fact may be able to suggest a finan-
"cial plan which would be satisfactory to all con-
"cerned.

"Respectfully yours,

"F. S. SAMUELS."

"Excuse pencil.

(Witness continuing): The letter is dated April 8th. About that time Mr. Spreckels and I were making preparations to go into the trial of the suit that ter-

minated in this agreement of 1899, June 8th; the foreclosure of the security suit in San Francisco. This reference in this letter relating to Huntington direct is in relation to selling the road. With respect to notifying Mr. Samuels and Spreckels Brothers & Company that I expected to put a financial deal through with Huntington, a financial deal with Huntington was the subject of discussion between ourselves, Messrs. Spreckels and Samuels, and me, for four or five years. The Payne and Hall reports referred to in the letter were these: The Payne report was the report made by Mr. Horn Payne of Sperling & Company in 1893, who came out from England to examine the Coos Bay property and made a report to Messrs. Spreckels & Company; a very long report about the plan of finance. Mr. Hall was the engineer brought over by Mr. Horn Payne who advised him on the engineering problems of the road.

MR. McNAB: You may proceed with the cross examination.

MR. DUNNE: If Your Honor please, Mr. McNab asked for an admission as to the appointment of a statutory agent by the Spreckels Company for the state of Oregon, and I do not perceive the relevancy of the request for that admission under the pleadings, I should be obliged to Mr. McNab if he would indicate frankly to me its relevancy.

MR. McNAB: Certainly, Your Honor. I supposed its relevancy was apparent to counsel. They have pleaded the statutes of limitations of Oregon on behalf

of J. D. Spreckels & Brothers Company. Under the well established rules you are not permitted to plead statutory limitations in the state of Oregon nor in the Federal court, under the decisions of the Federal court.

MR. DUNNE: That is the only purpose?

MR. McNABB: I do not say the only one, no; but it is the chief one that appeals to me at the present moment. I regard it also as jurisdictional; I don't know that it is. There is no question of jurisdiction now; the parties are all here. I do not ask you to accept my assurance at all because if it is a matter of any importance to you. I do not ask you to do that, but the records of the Secretary of the State of Oregon show that John D. Spreckels & Brothers Company never at any time were registered in the state of Oregon according to the statute, and never designated a managing agent in the state of Oregon.

MR. DUNNE: I think when the proper time comes we can show Your Honor the pertinency of any application of the statute of limitations; but if there is any other relevancy which the admission had to the issues raised in these pleadings, I shall be very glad to have counsel state it frankly, because it is my disposition always to make admission and not to annoy counsel with unnecessary technical proof.

MR. McNAB: No other reason appears to me at the present moment.

MR. PIPES. Will this be satisfactory? Your admission is subject to objection as to competency.

MR. DUNNE: If you will allow us, I think we can take that up this afternoon.

CROSS EXAMINATION.

MR. McNAB: It is my desire to act in consonance with the policy adopted by the other side of not interposing harassing and annoying objections; therefore, may we have the same understanding that we made during the argument and at a subsequent time without interrupting the testimony, objecting to any question asked on cross examination as not being cross examination, or upon any ground which may appeal to us at that time unless, of course, some special matter which we regard as of vital importance?

MR. DUNNE: Certainly.

THE WITNESS: I first met Mr. J. D. Spreckels in reference to this property in the years 1889 and 1890. My first transaction with Mr. Spreckels was in respect to the purchase of rails in 1890; at that time no rails had been laid on this road. The first rails that were ever laid upon this railroad between Marshfield and Myrtle Point were rails I got from the Spreckels Company. I have no receipts showing any moneys I actually paid upon this road. The first lot of rails received in point of quantity was approximately ten miles; they came in money to \$34,000. We gave a note for them; two notes, as I remember, of seventeen thousand each, or thereabouts. The notes were endorsed by J. W. Collins. He committed suicide. I never paid the note and got them back. I acquired this Marshfield

land from C. H. Merchant; that was given as a subsidy for building the railroad, part of the subsidy. At the time the railroad was formed, the stock was issued and the bonds were deposited with the Spreckels. At that time the two notes of seventeen thousand dollars were outstanding, when the stocks and bonds were deposited. Further advances were made by Spreckels after I got the rails in 1892. The road was carried to Myrtle Point, reaching there in the fall of 1893. My impression is that the trustee made a deed of the land that I got from Merchant as a subsidy, to the Spreckels Company at my instruction. When this agreement of June 8, 1899, was made the deed of the Merchant land was not in the possession of the Spreckels Company from me; it was deeded by Mr. T. R. Sheridan, as trustee, in the fall of 1893, to J. D. Spreckels & Brothers Company. The insurance policy was deposited with the Spreckels Company February, 1895, or 1896. Prior to the making of the note of November 1, 1897, the advances made by the Spreckels Company, over and above these two notes for seventeen thousand dollars, were carried as a book account. At the time that the book account was consolidated into the note of November 1, 1897, the Spreckels were holding the stocks, the bonds, the Marshfield deed and the insurance policy. Nobody else was present at that conversation between A. B. Spreckels and myself when Mr. A. B. Spreckels said he would return to me the Beaver Hill Coal stock and the insurance policy. The next morning when Mr. J. D. Spreckels and Mr. A. B. Spreckels and I met, they opened up hostilities without any warning; the

discussion was very, very unsatisfactory; I was very much annoyed by it, and when they demanded my resignation I don't think there was much other discussion than the fact that I wouldn't resign. I have no separate recollection that in that conversation and in the presence of J. D. Spreckels I made any reference to the statement that my Beaver Hill stock and insurance policy were to be returned to me at Marshfield.

(Counsel for defendant shows witness letter in affidavit of J. D. Spreckels contained in Judgment Roll No. 2388, being Judgment Roll in the action brought by J. D. Spreckels & Brothers Company against the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, as follows):

"Palace Hotel, San Francisco, Cal., April 27, 1898.

"Messrs. J. D. Spreckels & Bros. Co.

"Dear Sirs:

"When I gave the note to you on November the
"1st last it was agreed between your Mr. A. B.
"Spreckels and myself that my stock in the Beaver
"Hill Coal Co. was released from any further claim
"upon it, and that the life insurance policy as-
"signed to you would be transferred back to me.
"I have not received the stock nor the policy. Please
"deliver them to the bearer for me.

"
"Yours,

"
"R. A. GRAHAM."

(Witness continuing): I don't remember whether I signed that letter, but it sounds something like that.

(Counsel for defendant shows witness letter in answer to last above letter, dated April 27, 1898, as follows) :

“ San Francisco, April 27, 1898.

“R. A. Graham, Esq.,

“ Palace Hotel,

“Dear Sir:

“ Replying to your memorandum of 27th instant,
“regarding Beaver Hill Coal Company’s stock and
“life insurance policy, I have to say that there was
“absolutely no such understanding, or even a con-
“versation in regard to the transfer of stock or life
“insurance policy to you,

“ Yours truly,

“ A. B. SPRECKELS.”

(Witness continuing) : I have some recollection of receiving that letter. I never got that policy. After this conversation between me and A. B. Spreckels, and in respect to which the A. B. Spreckels letters just read was written the premium continued to accrue to me on that life insurance policy. Mr. Spreckels paid them. My recollection is that \$60,000 was paid the Normans for the Beaver Hill coal property. Mr. Spreckels furnished the money. I don’t know how much of that was furnished by stumpage and royalty on coal; something was.

(Counsel for defendant shows witness certificate of 2500 shares of stock in the Beaver Hill Coal Company, issued in the name of R. A. Graham, May 15, 1895.)

(Witness continuing): Upon being shown the last-above mentioned certificate I state that the endorsement upon the stock, "R. A. Graham" is in my handwriting. I have testified that this stock or certificate in so far as it was distributed out into 2490 shares to Mr. A. B. Spreckels and 10 shares to Mr. W. D. K. Gibson on April 29, 1898, as far as I was concerned was an unauthorized proceeding. My impression is that I made the endorsement on the back of that certificate at the time the certificate was drawn up to leave it as collateral security with Mr. Graham.

MR. DUNNE: I call your attention to the following clause and paragraph in the Norman contract: "It is
"also agreed that a company shall be incorporated
"under the laws of the state of ———, (no name
"of any state being mentioned, Your Honor)—
"And that the entire capital stock of said company
"is to be held and owned by the party of the second part," meaning thereby the Spreckels Company, "until such time as has been hereinafter provided that the surplus profits exceed the sum necessary for the liquidation of interest, and any indebtedness of the party of the first part to the parties of the second part has been cancelled. The
"half of the capital stock shall thereupon become
"the property of the party of the first part, and
"is to be transferred to the party of the first part
"or to his assigns."

(Witness continuing): I understood by that paragraph that I shouldn't become the possessor of this stock

as long as I owed Mr. Spreckels anything. I shouldn't participate in the profits of the mine until they were paid off. Mr. Chandler first went up to the Beaver Hill mine in August or September, '97; he remained eight or ten days. He returned within a month of the time that he went away; the second time he remained only a few days. Mr. Chandler upon the occasion of his first visit was looking into the condition of things, and I facilitated him. I have no recollection that in 1897, after Mr. Chandler had made his second visit or investigation that Mr. Fred Samuels told me that Mr. Chandler had made an unfavorable report upon the property and my administration of it; he didn't tell me. I ceased to be the representative of the Spreckels in respect to the mining property, and Mr. Chandler superseded me in December, 1897; I have never been in charge of the coal property since. I certainly did not offer Mr. Chandler when up there to make his investigation into the condition of that property and report to the Spreckels Company the sum of ten thousand dollars or any larger amount if he would make a favorable report upon the property to the Spreckels Company. I never at any time offered a bribe to Mr. Chandler to return a favorable report during the time that he was investigating the property. Mr. Chandler shut down the mine; my impression is he shut it down in February. At the time he shut down the mine I was connected with the Coos Bay Railroad in the capacity I had always been; I was general manager of it. There was a board of directors. I never doubled the freight rates for the transportation of coal after Chandler su-

perseded me and went back there and prior to the time of shutting down the mine. I never had any charge whatever of the transportation of the coal; while I was in New York directly after the shutting down of the mine I had a communication from Mr. Hassett—. Mr. Chandler before shutting down the mine reduced the output of the mine and the freights given to the railroad to what my report was, to twenty tons a day. Hassett, who was secretary of the Railroad Company, notified Chandler, not at my instruction, without my knowledge; at the same time I am going to stand for it because if he had notified me I should have stood it; I should have said do it; he notified Chandler that they would have to raise the rates to a dollar a ton. The object was to get \$20 for running a train from Marshfield to the mine and back again; a dollar a ton on one car of twenty tons that he was shipping would just make that; but in the same letter which we will produce a copy of, we told him that if he would put the output of coal back to a hundred tons a day, where it had been, they would then put the rate back to the same place; and he further offered the concession of reducing it down ten cents a ton for each proportionate number of tons until it got down to thirty cents a ton, a place where it had never been before. To my knowledge we did not raise the rates upon everything else in the way of supplies into the mine. To my knowledge we did not impose a charge of ten cents on the ton for bunker storage after Chandler took charge before the mine was shut down. The first litigation begun between the Spreckels Company and myself was when I asked for a

receiver for the Beaver Hill Coal Company; that was the case of Graham against the Beaver Hill Coal Company; my recollection is it was commenced June 7, 1898, five or six months after I had been superseded by Mr. Chandler.

(Counsel for defendant offers in evidence the tenth paragraph of Graham's complaint in that case, referring to the third day of December, 1897, as follows:

“ That on said last mentioned day the plaintiff
“resigned the said management of the said proper-
“ties and that he did so at the request of his co-
“owners, the said A. B. Spreckels and John D.
“Spreckels, and was induced by them so to do, up-
“on the statements and represenations made by
“them that they could and would operate, manage
“and conduct the said coal properties more econom-
“ically than plaintiff had been able to do, and that
“by plaintiff giving and turning over the manage-
“ment of the said properties, to said A. B. Spreck-
“els and John D. Spreckels, the interest of all par-
“ties concerned in the said corporation and said
“properties as well as those of the plaintiff, as of all
“other stockholders would be better protected, pre-
“served and advanced in value. That believing the
“said statements and representations and being ac-
“tuated by a desire to do that for the common in-
“terest which would be best therefor, and thinking
“that said A. B. Spreckels and John D. Spreckels
“might be able to manage the said properties more
“economically than plaintiff has been able to do,

“and more to the advantage, advancement and interest of all concerned, plaintiff did, on said 3rd day of December, 1897, resign and turn over the said management of the said properties of the defendant corporation to A. B. Spreckels and John D. Spreckels.”

Counsel for defendant offers in evidence the thirteenth paragraph of the complaint, which is as follows) :

“ That instead of continuing to work, operate and develop said properties and continue the management of the same as a going plant and concern, the said W. S. Chandler as manager of the said defendant corporation and acting under the direction and advice of the said A. B. Spreckels and John D. Spreckels, at once greatly reduced the working force employed at the mine and did so continue to reduce the same until on or about the ——day of ——, 1897, all the operators and employees of said mine were discharged and said coal mine was shut down and ceased to be operated and no coal was extracted therefrom or sent to the market.”

(Counsel for defendant offers in evidence the fourteenth paragraph of said complaint, which is as follows) :

“ That the said coal properties of the defendant corporation are no longer worked or operated; that since the resignation of said plaintiff as manager as aforesaid, the coal properties of said corporation

“in said Coos County have been grossly misman-
“aged, neglected and damaged; that pillars neces-
“sary to support the roof of the mine in orders to
“get out coal farther along the levels have been torn
“out, causing the mine to cave in and prevent the
“extraction of coal at the distant portions of the
“levels, slopes and gangways, and that irreparable
“loss has been occasioned by so doing; that all tracks
“in the mine have been removed, rendering it im-
“possible to take out coal and that the hoisting en-
“gine in the mine has been taken away, the mine
“practically abandoned and the vast improvements
“neglected and allowed to decay.”

(Counsel for defendant offers in evidence the fifteenth paragraph of the above mentioned complaint, which is as follows:

“ That in addition to the foregoing acts of mis-
“management of said coal properties, the board of
“directors of said corporation controlled by said A.
“B. Spreckels and J. D. Spreckels as aforesaid
“have neglected to care for said properties; that as
“a result thereof, a fire carelessly started in the
“mine at the head of the slope in the water level
“gangway, which was not properly or at all at-
“tended to and resulted in the burning up of many
“tons of coal, the exact amount plaintiff is at this
“time unable to state, but believes it to be many
“thousands of tons, and therefore alleges it to be so
“and that same is still burning and that no proper
“means are being used to extinguish it.”

(Counsel for defendant offers in evidence the nineteenth paragraph of the complaint, which is as follows:)

“ Plaintiff is informed and believes and there-
“fore alleges that said A. B. Spreckels and J. D.
“Spreckels have on their own account acquired coal
“lands about five or six miles distant from the lands
“of the defendant corporation; that said lands are
“being prospected and developed under the direc-
“tion of A. B. Spreckels and J. D. Spreckels for
“their exclusive benefit by W. S. Chandler, who is
“drawing a salary of four thousand dollars a year
“from the defendant corporation; that said A. B.
“Spreckels and J. D. Spreckels are using and have
“used the tools, implements, horses, mules, and
“property of the Beaver Hill Company in develop-
“ing and prospecting their individual coal lands and
“are in like manner using articles from the defend-
“ant corporation’s store without charging them-
“selves therefor.”

(Counsel for defendant offers in evidence in the same proceedings, the order appointing receiver, said receiver being J. B. Hassett, dated June 7th, 1898.)

(NOTE: The last above offered order appointing receiver is not copied into the statment of evidence, but is made a part of the record and may be found in the judgment roll accompanying the same.)

(Counsel for defendant offers in evidence petition of the Beaver Hill Coal Company, of A. B. Spreckels, of John D. Spreckels, of F. S. Samuels and C. A.

Hugg, all of whom are defendants with Beaver Hill Coal Company in the case, being the petition filed June 10, 1898).

(NOTE: The petitions last offered are not copied into this statement of evidence but are made a part of the record hereof, and may be found in the judgment rolls accompanying the same.)

(Counsel for defendant offers in evidence the order of Judge Fullerton in the matter of the removal, which is as follows:

“ *In the Circuit Court of the State of Oregon*

“ *For the County of Coos.*

“R. C. Graham, plaintiff,

“ vs.

“Beaver Hill Coal Company, a Corpora-

“ tion, A. B. Spreckels, J. D. Spreckels,

“ F. S. Samuels, and C. A. Hugg, De-

“ fendants.

“ The defendants herein having duly presented

“and filed a petition for the removal of the above

“entitled cause from the above entitled court to the

“Circuit Court of the United States, in and for the

“District of Oregon, and having duly presented,

“offered and filed a good and sufficient bond in

“the sum of \$1,000, as required by the statute in

“such cases made and provided, which bond has been

“and is hereby approved, it is hereby ordered that

“no further proceedings be taken by this court in

“the matter of said cause, and that said cause be,

“and the same is hereby removed from the Circuit
“Court of the State of Oregon, for the County of
“Coos, to the Circuit Court of the United States
“for the District of Oregon, and that the clerk of
“this court is hereby ordered forthwith, upon the
“request of said defendants to certify the records
“and proceedings in this court in this cause to the
“said Circuit Court of the United States for the
“District of Oregon.

“
“**J. C. FULLERTON,**
“ Judge of the Circuit Court of the State
“ of Oregon for the County of Coos.
“Dated June 13, 1898.”

(Counsel for defendant offers in evidence certain certificate of the County Clerk in the Circuit Court of Coos County, as follows:

“ I, Ed. Rackleff, hereby certify that I am
“County Clerk of the County of Coos, in the State
“of Oregon, and ex-officio clerk of the Circuit
“Court for said County. I hereby certify that I
“have compared the foregoing copy of complaint,
“order appointing receiver, bond of receiver, oath
“of office of receiver, order modifying receiver’s
“powers, petition for removal of cause to the United
“States Circuit Court, bond of defendants for the
“removal of said cause and order approving bond
“and petition for removal of cause and to certify
“record to the United States Circuit Court, with
“the originals of said papers, now on file and of
“record in my office as County Clerk as aforesaid,

“and that the same are true and correct transcripts
“from such originals and of the whole thereof, to-
“gether with the endorsements thereon.

“ And I further certify that the said foregoing
“mentioned papers constitute the judgment roll
“and records and proceedings in said cause and are
“all of the papers that have been filed in my office
“in said cause.

“ WITNESS my hand and the seal of the Cir-
“cuit Court this 14th day of June, 1898.

“ ED. RACKLEFF,
“ County Clerk of Coos County, State of
“ Oregon, and ex-officio Clerk of the Circuit
“ Court of the State of Oregon in and for
“ the County of Coos.

“ (SEAL) By L. H. HAZARD,
“ Deputy.”

(Counsel for defendant offers in evidence the order
of Judge Bellinger in the Circuit Court of the State
of Oregon for Coos County:

“ Circuit Court of the State of Oregon for Coos
“County, having on the 13th day of June, 1898,
“directed J. D. Hassett, receiver of the Beaver Hill
“Coal Company, to hold the property of said cor-
“poration intact and to dispose of none of the prop-
“erty of said corporation, and the case now being
“removed to this court from the Circuit Court of
“the State of Oregon for the County of Coos, and
“it being represented to this court that said J. B.

“cuit Court of the State of Oregon for the County
“of Coos, made prior to the removal of this cause
“upon the ex parte application of the plaintiff here-
“in, appointing one J. B. Hassett receiver of the
“property of this defendant, the Beaver Hill Coal
“Company, be vacated and held for naught; and
“that said J. B. Hassett be discharged as such re-
“ceiver, and that he be directed to turn over to the
“proper officers of this defendant, all the property
“of this defendant in his possession; for the follow-
“ing reasons:

“ 1. That said Oregon Court and this court
“have no jurisdiction of this suit, or to appoint a
“receiver of the property of this defendant.

“ 2. For the reason that said complaint fails to
“disclose any ground or reason why any receiver
“should be appointed.

“ 3. For the reason that said receiver was ap-
“pointed without notice to the defendants, and with-
“out the consent of this defendant.

“ 4. For the reason that said receiver is not a
“fit and proper person to act as receiver, and is
“not neutral and indifferent as between the par-
“ties.

“ In support of all of which this defendant will
“rely upon the record in this cause, and the affida-
“vits of John D. Spreckels, A. B. Spreckels, F. S.
“Samuels, W. S. Chandler, Fred H. Powers, C. H.
“Merchant, W. D. K. Gibson, John Curren, Alex-

“ander Love, D. L. Watson, W. H. Hamilton and
“F. J. DeNeveu, filed herewith, and such other af-
“fidavits as may hereafter be filed herein, with per-
“mission of this court.

“ WILLIAMS, WOOD & LINTHICUM,
“ Solicitors for Beaver Hill Coal Co.
“E. F. PRESTON
“and
“HELLER & POWERS,
“ Of Counsel for Defendant.”

MR. DUNNE: This was filed June 23, 1898. I offer in evidence in that connection the affidavit of John D. Spreckels.

MR. McNAB: I wish to interpose an objection specifically to the introduction in evidence of ex parte affidavits made by John D. Spreckels, A. B. Spreckels, or any person who is not before this court as a witness, on the ground that it would be hearsay, incompetent, irrelevant and immaterial. The witnesses themselves should be produced.

PLAINTIFF'S EXCEPTION NO. 1.

(Counsel for defendant reads in evidence affidavit of J. D. Spreckels.)

(The affidavit last above offered is not copied into this statement of evidence, but is made a part of the record and may be found within the judgment rolls accompanying the same.)

(An adjournment was here taken until 2 p. m.)

AFTERNOON SESSION.

April 19, 1916, at 2 p. m.

MR. DUNNE: If your Honor please, Mr. McNab asked for an admission touching the filing of a certificate of appointment in the matter of agency of the corporation doing business in this state, pursuant to the statute of this state, and without going further, I will give him the admission; subject, of course, to correction and verification by us, because we have not examined into the matter; but we will give you the admission subject to correction, and subject, of course, if your Honor please, to our objections to the impertinency, irrelevancy and incompetency of the admission.

MR. McNAB: I should like, when you have the opportunity, Mr. Dunne, to examine the records in the Secretary of State's office, to have the admission go to the extent required by the statute. There are a few things required to be done by the statute.

MR. DUNNE: Yes, I will compare the statute with you, Mr. McNab. I don't want to put you to the necessity of any technical proof.

MR. McNAB: No, I understand. Now, Mr. Dunne, just at this time I should like to inquire, for the purpose of an objection which will be general in its nature, are the affidavits which you are now reading offered in evidence in support of the truth of the facts which they contain, or are they offered for the purpose of showing that they were affidavits simply filed in that record?

MR. DUNNE: They are offered for both purposes.

MR. McNAB: Then I desire to object, if your Honor please, to the introduction in evidence of the ex parte affidavits of the Spreckels and other witnesses offered in that matter, in a proceeding purely collateral to this, as incompetent to establish any fact in this matter.

THE COURT: Very well, it will be admitted.

PLAINTIFF'S EXCEPTION NO. 2.

(Counsel for defendant offers in evidence the affidavit of A. B. Spreckels.)

(NOTE: The last above offered affidavit is not copied into this Statement of Evidence, but is made a part of the record and may be found in the Judgment Rolls accompanying the same.)

(The affidavit of William H. Hamilton read in evidence.)

(NOTE: The affidavit of William H. Hamilton is not copied into this Statement of Evidence, but is made a part of the record hereof and may be found in the Judgment Rolls accompanying the same.)

MR. McNAB: In order to save any possible right, if your Honor please, I move to strike the affidavit which has been read in evidence from the record, on the same ground urged to its admissibility.

(Counsel for defendant reads in evidence the deposition of F. S. Samuels.)

(NOTE: The affidavit of F. S. Samuels is not copied into this Statement of Evidence, but is made a part of the record hereof and may be found in the Judgment Rolls accompanying the same.)

MR. McNAB: You propose to read the rest of them, do you, Mr. Dunne?

MR. DUNNE: Yes.

MR. McNAB: If your Honor please, in addition to the objections which I have heretofore made, I desire to not only object to the receipt of this affidavit in evidence at this time, but move to strike it out on the ground that it is incompetent as evidence in this case, and that it is hearsay, and on the further ground that it is a mere ex parte affidavit, and that the maker of the affidavit is sitting at the side of counsel for the defendant in this case in open court at this time, and that he is within the process of the court and can be called as a witness. Now, whatever your Honor's ruling may be with regard to that, I do at this time desire to urge an objection upon which I feel we are entitled to a ruling, and that is, that none of these affidavits are cross-examination. The plaintiff in this case is on the witness-stand, and his direct examination has been concluded, and he has been surrendered to the other side for the purposes of cross-examination. Now, counsel at endless length are proceeding to read ex parte affidavits offered by the other side, in litigation of a number of

years ago, without any reference to the witness on the stand, without asking him anything concerning these matters, and are simply proceeding to offer these as independent evidence, and not as cross-examination. If counsel should conclude that these are relevant to the proofs he desires to offer in his own case, that can be met at the time, but they are certainly not cross-examination at this time, and as such I desire to object to their admission.

THE COURT: I think they might just as well be read at this time as any other. He is offering them. They will be admitted subject to that objection.

PLAINTIFF'S EXCEPTION NO. 3.

(Counsel for defendant reads in evidence the affidavit of W. D. K. Gibson.)

(NOTE: The last above mentioned affidavit is not copied into this Statement of Evidence, but is made a part of the record hereof, and may be found in the Judgment Rolls accompanying the same.)

(Counsel for defendant offer in evidence the affidavit of Frank Powers.)

(NOTE: That affidavit of Frank Powers is not copied into this Statement of Evidence, but is made a part of the record hereof, and may be found in the Judgment Rolls accompanying the same.)

MR. McNAB: May I interject the same motion made to the other, if your Honor please?

THE COURT: Very well.

(Counsel for defendant offers in evidence the affidavit of W. S. Chandler.)

(NOTE: The affidavit of W. S. Chandler is not copied into this Statement of Evidence, but is made a part of the record hereof, and may be found among the Judgment Rolls accompanying the same.)

MR. McNAB: I would like to renew my motion for the striking out of this affidavit, and also should like to have it noted by the reporter that Mr. Chandler, the affiant in that affidavit, is in the court-room at the present time, subject to the process of this court.

(Counsel for defendant offers in evidence the affidavit of Mr. W. S. Chandler.)

(NOTE: The affidavit last above offered of W. S. Chandler, is not copied into this Statement of Evidence, but is made a part of the record hereof, and may be found amongst the Judgment Rolls accompanying the same.)

MR. McNAB: I want to renew the same motion I made as to the former one, your Honor.

(Counsel for defendant offers in evidence affidavit of F. J. Neveu.)

(NOTE: The affidavit of F. J. Neveu is not copied into this Statement of Evidence, but is made a part of the record hereof, and may be found amongst the Judgment Rolls accompanying the same.)

THE COURT: Mr. Dunne, what do you claim for these affidavits?

MR. DUNNE: I will state, your Honor. In the first place, it has been suggested here that there was a certain element of oppression in this case indicated by various proceedings in the litigation and various charges made. I now want to show to your Honor whether in the making of these charges and in the conduct of this litigation we were acting oppressively or in good faith. In the next place this is litigation to which this plaintiff here is a party and he is directly connected with these proceedings and these affidavits, and charges were made responsive to the proceedings initiated by him and to which he was directly a part; so I offer these as *res gesta* of the actual doings under this suggested head of oppression. In the next place, he was asked the categorical question on his direct examination whether these charges had not been made against him and whether there was any proof in these charges, and whether any evidence had been produced in any court against him of the truth of these charges.

MR. McNAB: In response, will your Honor permit me to make this observation: We did not offer this record in evidence at all. The complaint in the action to which Mr. Dunne now makes reference was not alluded to in our case in any respect whatever, nor was it offered in evidence other than that an allusion was made to it yesterday in grouping the cases. This mass of affidavits now present is a mass of affidavits made by witnesses who are all living and who are within the

jurisdiction of this court, and it is simply an effort to prove by indirection what they do not dare to attempt to prove by direction, and the consequence will be that if these affidavits are to be introduced for the purpose of establishing directly the facts to which they refer, we will have placed upon us the burden of reading to this court, and the court will have imposed upon it the burden of listening to a dreary length of affidavits filed by Mr. Graham's side of the case in which all these charges or supposed charges are either met, denied or explained; and while I am perfectly familiar with the liberality attending the introduction of evidence in a court of equity, it seems to me it is entirely beyond the issues in this case to permit them to go back into a purely collateral matter for the purpose of dragging before the court the fact that at that time they were charging this man with all the crimes in the decalogue, and it was for that purpose that we offer our objection.

PLAINTIFF'S EXCEPTION NO. 4.

(Counsel for defendant offers in evidence the second affidavit of Mr. De Neveu.)

(NOTE: The affidavit of Mr. F. J. De Neveu is not copied into this Statement of Evidence, but is made a part of the record hereof, and may be found amongst the Judgment Rolls accompanying the same.)

(Counsel for defendant offers in evidence the affidavit of C. H. Merchant.)

(NOTE: The affidavit of C. H. Merchant is not copied into this Statement of Evidence, but is made a

part of the record hereof, and may be found in the Judgment Rolls accompanying the same.)

MR. DUNNE: It is understood that these affidavits are contained in this Judgment Roll No. 2487 without unnecessary particularization.

MR. McNAB: And that all of them are subject to our objections.

PLAINTIFF'S EXCEPTION NO. 5.

(Counsel for defendant offered in evidence, which was deemed as read, the affidavit of D. L. Watson.)

(NOTE: The affidavit of D. L. Watson is not copied into this Statement of Evidence, but is made a part hereof, and may be found among the Judgment Rolls accompanying the same.)

(Counsel for Defendant offered in evidence the affidavit of John Curren and the affidavit of Alexander Love, which were considered as read.)

(NOTE: The affidavits of John Curren and Alexander Love last above offered are not copied into this Statement of Evidence, but are made a part of the record hereof; and may be found among the Judgment Rolls accompanying the same.)

(Counsel for defendant offered in evidence the affidavit of John Curren, dated June 23, 1898, which was considered as read.)

(NOTE: The affidavit last above offered of John Curren, is not copied into this Statement of Evidence

but is made a part of the record hereof and may be found among the Judgment Rolls accompanying the same.)

(Counsel for defendant offered in evidence the affidavit of Joseph Grundy, dated June 24, 1898, which was considered read.)

(NOTE: The affidavit last above offered of Joseph Grundy is not copied into this Statement of Evidence, but is made a part of the record hereof, and may be found among the Judgment Rolls accompanying the same.)

(Counsel for defendant offered in evidence the affidavit of Frank Chapelon, dated June 24, 1898, which was considered as read.)

(NOTE: The affidavit last above offered of Frank Chapelon, is not copied into this Statement of Evidence but is made a part of the record hereof, and may be found among the Judgment Rolls accompanying the same.)

(Counsel for defendant offered in evidence the affidavit of W. J. White and the affidavit of John Rosby, dated June 20, 1898.)

(NOTE: The affidavits last above offered of W. J. White and John Rosby are not copied into this Statement of Evidence, but are made a part of the record hereof, and may be found among the Judgment Rolls accompanying the same.)

(Counsel for defendant offered in evidence the affidavit of J. W. Bennett, dated July 9, 1898, which was considered as read.)

(NOTE: The affidavit last above offered of J. W. Bennett is not copied into this Statement of Evidence, but is made a part of the record hereof, and may be found among the Judgment Rolls accompanying the same.)

(Counsel for defendant offers in evidence, which is considered as read, the affidavit of R. A. Graham, dated July 9, 1898.)

(NOTE: The affidavit last above offered of R. A. Graham is not copied into this Statement of Evidence, but is made a part of the record hereof, and may be found in the Judgment Rolls accompanying the same.)

(Counsel for defendant offers in evidence the affidavit of L. A. Lewis, which is dated July 20, 1898, and which is considered as read.)

(NOTE: The affidavit of L. A. Lewis is not copied into this Statement of Evidence, but is made a part of the record hereof; and may be found among the Judgment Rolls accompanying the same.)

(Counsel for defendant offers in evidence the answer of the Beaver Hill Coal Company, A. B. Spreckels, John D. Spreckels, F. S. Samuels and C. A. Hugg, to the Graham complaint and which is considered as read.)

(The answer of the Beaver Hill Company, A. B. Spreckels, John D. Spreckels, F. S. Samuels and C. A. Hugg, last above offered, is not copied into this Statement of Evidence but is made a part of the record hereof, and may be found among the Judgment Rolls accompanying the same.)

THE WITNESS: Regarding a letter contained in the answer, I think I recall writing that letter.

(The letter referred to is of date November 30, 1897, contained in the answer above offered.)

(Counsel for defendant offers in evidence, which is considered as read, the amended answer of defendants in the case, and the replication of the plaintiff.)

(NOTE: The last above offered amended answer of defendant and the replication of the plaintiff is not copied into this Statement of Evidence, but is made a part of the record hereof, and may be found in the Judgment Rolls accompanying the same.)

(Counsel for defendant offers in evidence the order of Judge Bellinger to show cause why the order appointing Hassett as the receiver should not be vacated and held for naught.)

(NOTE: The above last offer of the Order of Judge Bellinger is not copied into this Statement of Evidence, but is made a part of the record hereof, and may be found in the Judgment Rolls accompanying the same.)

(Counsel for defendant offers in evidence, which is considered as read, the order of Judge Bellinger, dated July 22, 1898, removing J. B. Hassett as receiver, and appointing W. W. Catlin as receiver.)

(NOTE: The last above offer is not copied into this Statement of Evidence but is made a part of the record hereof; and may be found in the Judgment Rolls accompanying the same.)

(Counsel for defendant offers in evidence, which is considered as read, exceptions and objections of the Beaver Hill Company to the report of J. B. Hassett, the Receiver.)

(NOTE: The last above offer is not copied into this Statement of Evidence, but is made a part of the record hereof, and may be found in the Judgment Rolls accompanying the same.)

(Counsel for defendant offers in evidence, which is considered as read, the order of Judge Bellinger, dated January 7, 1898, referring the exceptions to the Receiver's reports of J. B. Hassett, to an Examiner of the court.)

(NOTE: The last above is not copied into this Statement of Evidence, but is made a part of the record hereof, and may be found amongst the Judgment Rolls accompanying the same.)

(Counsel for defendant offers in evidence, which is considered as read, the order of the court settling the account of Hassett and discharging him, dated July 30, 1900.)

(NOTE: The last above offer is not copied into this Statement of Evidence, but is made a part of the record hereof, and may be found in the Judgment Rolls accompanying the same.)

(Counsel for defendant offers in evidence, which is considered as read, the order discharging Catlin as Receiver.)

(NOTE: The last above offer is not copied into this Statement of Evidence, but is made a part of the record hereof, and may be found in the Judgment Rolls accompanying the same.)

(Counsel for defendant offers in evidence, which is considered as read, the report of Mr. Hassett.)

(NOTE: The last above offer of the report of Mr. Hassett is not copied into this Statement of Evidence, but is made a part of the record hereof, and may be found in the Judgment Rolls accompanying the same.)

MR. McNAB: There is no dispute between us that my objection goes to all this, is there, Mr. Dunne?

MR. DUNNE: Not at all; not at all.

PLAINTIFF'S EXCEPTION NO. 6.

(Counsel for defendant offers in evidence the report of W. W. Catlin, which is considered as read.)

(NOTE: The report of W. W. Catlin last above offered is not copied into this Statement of Evidence but is made a part of the record hereof, and may be found in the Judgment Rolls accompanying the same.)

MR. DUNNE: I think, your Honor, I have about exhausted that Judgment Roll.

MR. McNAB: In order to save any formal right, if your Honor please, I want to move to strike out all the evidence which has been offered in this Judgment Roll.

THE COURT: Very well.

MR. DUNNE: If your Honor please, I am now going to call attention to the Judgment Roll in the case brought by J. D. Spreckles & Brothers Company against the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, January 9, 1899, being the date of the bill of complaint in the Circuit Court of the United States for the District of Oregon, and I am offering this with the same point of view which I amplified in answer to your Honor's question.

MR. McNAB: In the Judgment Roll which has just been receiving the court's attention, the case of *Graham vs. The Beaver Hill Coal Company*, while we object to the admission of any affidavits in that and certainly consider that they cannot be received as independent evidence in this court, nevertheless without waiving that, if they are subsequently to be admitted there is an affidavit entered by J. B. Hassett who is thus attacked while not before the court and I feel if these other affidavits are to be admitted, that affidavit should be admitted also.

MR. DUNNE: If I omitted it it was through inadvertence and it will be offered by me.

MR. McNAB: I do not wish to take the time to read it, but I wish to say that fully and at great length every charge set forth in the affidavit is explained in detail.

MR. DUNNE: My purpose in offering these was to read all the affidavits because I considered in view of what I said this morning that the whole matter is the *res gesta*.

I now offer in evidence the complaint in the Circuit Court of the United States for the District of Oregon, entitled John D. Spreckels & Brothers Company, complainant, against the Coos Bay, Roseburg & Eastern Railroad & Navigation Company.

(NOTE: The last above mentioned offer is not copied into this Statement of Evidence, but is made a part of the record hereof, and may be found in the Judgment Rolls accompanying the same.)

(Counsel for defendant offers in evidence, which is considered as read, Subpoena issued, also application for the order setting the hearing of the application for a receiver, which is also considered as read; the order permitting the amendment to the complaint, which is also considered as read; and the amended complaint and appearance of the Coos Bay Railroad Company by demurrer; also considered as read in evidence.)

(NOTE: The last above mentioned offers are not copied into this Statement of Evidence, but are made a part of the record hereof, and may be found in the Judgment Rolls accompanying the same.)

(Counsel for defendant offers in evidence the appearance of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company by demurrer, which is considered as read.)

(NOTE: The last above offer of appearance of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company by demurrer is not copied into this Statement of Evidence, but is made a part of the record hereof, and may be found in the Judgment Rolls accompanying the same.)

(Counsel for defendants now offers in evidence, which is considered as read, the affidavit of J. B. Hassett in the same proceedings in the Coos Bay Company, not with the Coal Company.)

(NOTE: The last above offer is not copied into this Statement of Evidence, but is made a part of the record hereof, and may be found in the Judgment Rolls accompanying the same.)

(An adjournment was here taken until tomorrow, Thursday, April 20, 1916, at 10 a. m.)

THURSDAY, APRIL 20, 1916, 10 A. M.

MR. PIPES: If the reading of these affidavts should be rested upon until the argument they can then all be read with as much effect as now, with this advantage, that at that time the question as to admissibility may be determined upon the suggestion made at the

argument, and if the court should be of the opinion that the affidavts are not admissible, they would still be in the record and for all purposes on appeal just as much as if they had been read, and of course if the court should decide that they are not competent, the reading would be dispensed with and the time would be saved. If, on the other hand, the court perceives that they are pertinent, competent and relevant to the issue here, they can then be read, with as much effect and with no disadvantage to the other side, and I am making that suggestion purely to save a lot of time and not because we have any objection to the reading of them. Our objection is to the introduction of them. As far as the reading of them at this time is concerned, we would have no objection to them for any purposes. That they may do the case any harm if they should finally be determined not to be competent, because if your Honor should rule that they are not evidence, the fact that they have been heard by your Honor would be disregarded.

PLAINTIFF'S EXCEPTION No. 7.

MR. DUNNE: If your Honor please, I will offer without reading, the complaint in the case of John D. Spreckels and Brothers Company, a corporation vs. The Coos Bay, Roseburg & Eastern Railroad & Navigation Company, R. A. Graham, J. B. Hassett and T. R. Sheridan, which was filed on January 9, 1899.

MR. McNAB: I offered that in evidence and read most of it in evidence.

(NOTE: The complaint last above offered is not copied into this Statement of Evidence, but is made a part of the Record hereof, and is to be found in the Judgment Rolls accompanying the same.)

(Counsel for defendant offers in evidence the affidavit of the complainant, Graham, in the case of J. D. Spreckels & Bros. Company, Complaint vs. Coos Bay, Roseburg & Eastern Railroad & Navigation Company, a corporation, R. A. Graham, J. B. Hassett and T. R. Sheridan, Defendants, filed January 30, 1899.)

(NOTE: The last above offer is not copied into this Statement of Evidence, but is made a part of the record hereof and is to be found in the Judgment Rolls accompanying the same.)

(Counsel for defendant offers in evidence the affidavit of William Henry Effinger.)

(NOTE: The last above offer of the affidavit of William Henry Effinger is not copied into this Statement of Evidence, but is made a part of the record hereof, and is to be found in the Judgment Rolls accompanying the same.)

(Counsel for defendant offers in evidence the affidavit of W. S. Chandler, dated February 1, 1899.)

(NOTE: The last above offer of the affidavit of W. S. Chandler is not copied into this Statement of Evidence, but is made a part of the record hereof and is to be found in the Judgment Rolls accompanying the same.)

(Counsel for defendant offers in evidence the affidavit of F. J. De Neveu, dated February 1, 1899.)

(NOTE: The last above offer of the affidavit of F. J. De Neveu, is not copied into this Statement of Evidence, but is made a part of the record hereof and is to be found in the Judgment Rolls accompanying the same.)

(Counsel for defendant offers in evidence the second affidavit of R. A. Graham, dated January 30, 1899, and filed on February 9, 1899.)

(NOTE: The last above offer of the second affidavit of R. A. Graham, dated January 30, 1899, is not copied into this Statement of Evidence, but is made a part of the record hereof; and is to be found in the Judgment Rolls accompanying the same.)

(Counsel for defendant offers in evidence the affidavit of A. B. Spreckels, dated January 31, 1899.)

(NOTE: The affidavit of A. B. Spreckels last above offered is not copied into this Statement of Evidence but is made a part of the record hereof, and is to be found in the Judgment Rolls accompanying the same.)

(Counsel for defendant offers in evidence the affidavit of F. S. Samuels, dated February 14, 1899.)

(NOTE: The last above offer of the affidavit of F. S. Samuels, is not copied into this Statement of Evidence, but is made a part of the record hereof; and is to be found in the Judgment Rolls accompanying the same.)

MR. McNAB: Lest there should be any misunderstanding, I move to strike this affidavit from the file, if your Honor please, and call your attention to the fact that Mr. Samuels is in the court room.

(Counsel for defendant offers in evidence the affidavit of John D. Spreckels.)

(NOTE: The affidavit of John D. Spreckels, last above offered is not copied into this Statement of Evidence, but is made a part of the record hereof, and may be found in the Judgment Rolls accompanying the same.)

MR. McNAB: You have just finished reading the affidavit of Mr. J. D. Spreckels?

MR. DUNNE: Yes.

MR. McNAB: Mr. Dunne, do you intend to bring Mr. A. B. Spreckels here to testify in this court?

MR. DUNNE: I don't think Mr. A. B. Spreckels is in a physical condition to come.

MR. McNAB: As to physical condition, we are willing to produce witnesses on the stand in this court room to prove that Mr. J. D. Spreckels and his brother are actively attending to their business in San Francisco, that he is now on a pleasure yacht, and that he has had ample notice to be here.

MR. DUNNE: We expect, Mr. McNab, that Mr. J. D. Spreckels will be here and will testify.

MR. McNAB: What about Mr. A. B. Spreckels?

MR. DUNNE: I don't believe it would be safe in his condition of health to bring him here. He has had at least two paralytic strokes.

MR. McNAB: Why didn't you take his deposition?

MR. HOHFELD: We stipulated for taking it on Wednesday before we came up.

MR. McNAB: It becomes very material because if this purely collateral stuff, all of which is massed here for the purpose of attempting to prejudice the mind of the court against this plaintiff on matters not before this court, is to be accepted in evidence, then it would require this plaintiff to go into the trial of half a dozen collateral suits which have long since been disposed of, and are supposed to have been fully fought out, so far as the affidavits are concerned in those cases; and it places us in this embarrassing situation, your Honor, that we cannot determine in advance—we have no way of determining what the views of the Court may be regarding the admissibility of these affidavits. The view which we take of this matter is that all that the other side is now putting in is merely aggravating the charges which we made that this plaintiff was oppressed and driven into the final settlement of this matter; but we cannot in advance know what the determination of the Court may be in that matter, and we simply cannot, and we shall refuse under our present state of mind, to follow away off into a collateral branch of this case. I don't believe that it would be consonant with the theory of the pleadings in this case; but I do

desire at this time to make a motion to strike all of these affidavits from the files, on the ground that they are irrelevant matter, and that they are not competent evidence in this case, and they are hearsay.

PLAINTIFF'S EXCEPTION No. 8.

(Counsel for defendant offers in evidence, which is considered as read, the affidavit of W. D. K. Gibson, dated February 1st, 1899.)

(NOTE: The affidavit of W. D. K. Gibson, last above offered, is not copied into this Statement of Evidence, but is made a part of the record hereof; and is to be found in the Judgment Rolls accompanying the same.)

(Counsel for defendant offers in evidence a further affidavit of Mr. Samuels, in reply to the affidavit of Mr. Hassett which is considered as read.)

(NOTE: The last made offer of the last affidavit of Mr. Samuels is not copied into this Statement of Evidence, but is made a part of the record hereof, and is to be found in the Judgment Rolls accompanying the same.)

(Counsel for defendant offers in evidence the answer of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, the replication and the stipulation for dismissal filed June 16, 1899, and the order of dismissal.)

(NOTE: The last above offer of the answer of the Coos Bay, Roseburg & Eastern Railroad & Navigation

Company, the replication, the stipulation for dismissal, filed June 16, 1899, and the order of dismissal, are not copied into this Statement of Evidence, but are made a part of the record hereof, and are to be found in the Judgment Rolls accompanying the same.)

THE WITNESS: Since I have been on the stand I have observed that counsel for defendant has offered in evidence certain proceedings in certain litigation; I observed that one of those proceedings or litigations was the case of Graham (myself) against the Beaver Hill Coal Company; that another and second proceeding or litigation was the proceeding by the J. D. Spreckels & Bros. Company against the Coos Bay, Roseburg & Eastern Railroad & Navigation Company; I also observed a reference to the circumstance that a suit had been brought by the Beaver Hill Coal Company against me for an accounting, in the Superior Court of the City of San Francisco. As to whether there are any other litigations pending between me and the J. D. Spreckels & Brothers Company or between the Coal Company, the Coos Bay, Roseburg & Eastern Company, and myself or J. D. Spreckels & Brothers Company, parties, or as between those parties in any capacity plaintiff or defendant, whether there was any other litigation pending at the time that I executed the agreement of June 8, 1899, as to whether there was any other litigation except the suit that I was trying at the time, the foreclosure suit, it is my recollection that it was the suit that we were trying, which is called the foreclosure suit. There was a suit which I brought against the Beaver Hill Coal Company; then there was the ac-

counting suit, the suit by the Beaver Hill Coal Company against me. Then there was the suit started in this court by J. D. Spreckels & Bros. Company foreclosing the bonds, of January 9, 1899. The suit that I have reference to is the suit—this agreement dates June 8, 1899.

MR. McNAB: Mr. Dunne, there was a disagreement between me and you the other day in describing the effect of that suit. It seems that it was a suit for the foreclosure of the bonds. In effect it was that, although it does not make the Farmers' Loan & Trust Company, trustee, a party, but it asserts that they have not taken any action, and it amends it and brings them in later.

(Counsel for defendant reads to witness the first clause of the agreement of June 8, 1899, as follows:)

“ Parties hereto for the purpose of completely
“adjusting all matters of difference between them-
“selves, and between each of them and the Beaver
“Hill Coal Company, a corporation and the Coos
“Bay, Roseburg & Eastern Railroad & Navigation
“Company, a corporation, do hereby agree as fol-
“lows:”

THE WITNESS (continuing): It is not my recollection that that agreement was prepared by my attorney, Mr. Frohman. I read that agreement before I signed it. With reference to the language in the agreement that the

“ Parties hereto for the purpose of completely
“adjusting all matters of difference between them-
“selves, and between each of them and the Beaver
“Hill Coal Company, a corporation, and the Coos
“Bay, Roseburg & Eastern Railroad & Navigation
“Company, a corporation, do hereby agree as fol-
“lows:”

I understood by a complete adjustment of all matters of difference, that it was to fix the amount that Mr. J. D Spreckels & Bros. Company claimed against all of these concerns, and which they would be willing to accept, and turn the property over to me, and be released from all of the side agreements which they had previously made, namely, the contract to build the road, to finance the road to Roseburg, and the contract to keep and supply money for the maintenance and operation of the Beaver Hill Coal mines.

At the trial of the suit before Judge Bahrs on the foreclosure, the attorneys who represented me were Mr. A. A. Moore, Mr. Isaac Frohman, Mr. Idleman, Mr. Effinger. I do not think that Judge Garber ever attended court at any time during the trial of that case. I think Mr. Frohman, occasionally Mr. Garber, conducted the negotiations for this settlement with Mr. Preston; the preliminary arrangements up till the time we came out of the court was by Mr. Creswell, another member of the firm, who brought the first suggestions of a settlement to us. These negotiations were conducted between the lawyers. During these negotiations, as to whether I had any communication with Mr. J.

D. Spreckels, A. B. Spreckels, or with anybody connected with the J. D. Spreckels & Bros. Company, I went to Mr. Preston's office at the request of Mr. Preston and my own attorneys to confer in the presence of Mr. Samuels here, about the subject of letting Chandler on the board of directors. The only subject under discussion at that time that I remember was they wanted to put Chandler on the board of directors. I had, up until that time, insisted that Chandler should not go on the board of directors of the railroad company. I had no idea that any other subject was touched on, in the presence of Mr. Samuels. Outside of the particular incident to which I have referred, these negotiations were carried on while the foreclosure suit was pending and on trial. They were carried on between the attorneys for me and the attorneys for the other side, and I had no communication or conference with the principal or the principals with me, except as to this one incident. I should like to add that I have no recollection of having any discussion with Mr. A. B. Spreckels since the 13th of December, 1897.

MR. DUNNE: Q. Now, I want to call your attention to the following paragraph, in this settlement, referring to the capital stock of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, "all of the shares of the capital stock of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, in excess of the 10,001 shares thereof, now held by the second party, certificates therefor to be properly endorsed, excepting seven shares thereof, to be issued to the directors of said corporation, as hereinafter pro-

vided." What was done in respect to the certificates of stock in excess of the ten thousand and one shares, and over and above the seven shares to the directors?

MR. McNAB: My objection to that is, that it does not constitute the best evidence, if your Honor please. We have made a request to present the books, the stock books showing the stock itself.

PLAINTIFF'S EXCEPTION No. 10.

THE WITNESS (Continuing): Those certificates of stock were turned over to the trustee over and above the ten thousand and one shares that were previously held by the Spreckels Company less the seven shares. They were not endorsed at the time they were turned over. They had been previously endorsed.

(Counsel for defendant called the witness's attention to sub-paragraph C of Paragraph 6 of the agreement as follows:

" A release executed by the first party, releasing
"and discharging the said Beaver Hill Coal Com-
"pany of and from any and all claims and demands
"which he may now have, or claim to have against
"said company, said release not to take effect, how-
"ever, except upon the failure of the first party to
"pay, or cause to be paid to said trustee, for the
"use and benefit of the second party, the sum of
"five hundred and fifty thousand dollars, gold coin
"of the United States, as hereinafter provided."

THE WITNESS (Continuing): As to whether the Beaver Hill stock was not included in the pledges sought to be foreclosed in the suit on file before Judge Bahrs I knew that they were not in the note suit. Mr. Frohman advised me that this instrument was a mortgage. Mr. Frohman told me that that instrument was a mortgage during the making of the instrument. Upon my direct examination my attention was called to my answer filed August 6, 1900, in the case of J. D. Spreckels & Bros. Company against the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and others, including myself as one of the defendants, my attention was called to the statement or admission in that answer, that the Spreckels Bros. Company were the owners, I admit their ownership of 20,000 shares of the capital stock of the Railroad Company, but denied simply their ownership of the bonds. With reference to that I state that I do not know how that admission got into the answer. I gave the following testimony in the salary case:

“MR. DUNNE: Q. In the case which you brought against the Coos Bay, Roseburg & Eastern Railroad & Navigation Company for salary, and in which you were defeated by the verdict of the jury as you testified in answering a question by Mr. McNab, I will ask you if upon the trial of that case your attention was called to that admission and you were asked the following question” (Page 106 of Tr. in said case):

Q. Now this is true as stated in this answer, is it not, Mr. Graham?

A. That answer was correct as we understood it at that time.”

Q. Was that your testimony in the salary case?

A. What answer have you reference to?

Q. Did you give the testimony in the salary case which I have just read?

A. I don't remember.

Q. You don't remember?

A. I don't remember. I gave testimony in the salary case.

Q. I will also ask you the question if in the salary case you gave the following testimony (page 121 of Tr. in said case):

(Page 121):

“ I will ask you, Mr. Graham, what documents
“you received from the Bank of California? A.
“I did not receive any. Q. I will ask you if you
“did not receive the satisfaction of the judgment,
“mentioned in this agreement? A. No. Q. I
“show you your signature, and the date on there,
“in your own hand, January 5, 1900, signed R. A.
“Graham. A. That is my signature. I did not
“get the papers. They offered me the satisfaction
“of judgment, and I says, ‘Where is the other?’
“They are both in the same clause.’ And Mr. Smith,
“the cashier of the Bank of California, said, ‘We
“will procure this for you.’ Q. That is the release?
“A. Yes, release and satisfaction of judgment.
“Q. These words ‘I hereby acknowledge due re-
“ceipt of satisfaction of judgment here mentioned,
“January 5, 1900, the words January 5, 1900 be-

"ing in ink and were written by you in your own handwriting at the time? A. Yes. Q. Is not that true? A. Yes. Q. You say that you did not take the satisfaction of judgment away with you, because you wanted to give the bank time to get the release from the company? A. Yes, sir. Q. That is the only reason that you did not take the satisfaction of judgment away with you? A. Yes, sir."

The release referred to there is the release from the Coos Bay, Roseburg & Eastern Railroad & Navigation Company. At that time that I had this interview with Mr. Smith I do not think that the Coos Bay, Roseburg & Eastern directorate had been reorganized. The same directorate was then in charge of the company, at the time that this instrument of June 8, 1899, was executed, as had been previously during my conduct of the company as general manager. I was a member of the board; Mr. Sheridan was President; J. W. Bennett was Vice-President; the directors were F. N. McLean, O. J. Seeley, William Trelease and Mr. Hassett. This was the same board of directors that had been in for some years. It was a release from the Coos Bay, Roseburg & Eastern Railroad & Navigation Company that I was referring to in my testimony which I gave in the salary case. In my deposition in the case of *R. A. Graham vs. C. H. Merchant* I gave the following testimony:

"Ninth. Did you not cause all the costs and expense of making said betterments and improve-

ments to be charged up to the Beaver Hill Coal Company while you were manager, or in control of the company? A. No. Only part of them, prior to December, 1897. On June 8, 1899, a final settlement was made between the Beaver Hill Coal Company, J. D. Spreckels & Bros. Company, and me. Under the terms of that settlement, the Beaver Hill Coal Company and J. D. Spreckels & Bros. Company relinquished all claims they had or claimed to have against me or my property for moneys expended in any way by me on this or any other property for improvements on the development of coal mines or lands, or for anything else."

I recall that a suit was brought by J. D. Spreckels & Bros. Company against the Coos Bay, Roseburg & Eastern Railroad Company, and against these persons whom I have named as directors to compel a registration in the name of J. D. Spreckels & Bros. Company or their nominees of the stock of the Coos Bay, Roseburg & Eastern which had not theretofore been transferred in their names upon the books of the company. I also recall that shortly after that there was this suit brought by the Farmers' Loan & Trust Company for the foreclosure of the bonds. I recall that at sometime in 1905, I sent personally to Mr. A. B. Spreckels the dismissals so far as I was concerned, in these proceedings.

(Counsel for defendant offers in evidence the complaint in the case known as the Registration case, found in Judgment Roll No. 2933.)

(A recess was here taken until 2 P. M.)

THURSDAY, APRIL 20th, 1916, 2 P. M.

"MR. DUNNE: If your Honor please, I am not entirely clear whether these stipulations of dismissal of February 8, 1905, have been read in evidence.

MR. McNAB: I read them, both in evidence.

MR. DUNNE: And so I will ask to read them now.

COURT: They were read, but I am not clear as to the form they were offered just before adjournment.

MR. DUNNE: (Reading):

*In the Circuit Court of the United States for the
District of Oregon.*

J. D. Spreckels & Brothers Company, a corporation organized and existing under the laws of the State of California and a citizen and inhabitant thereof,

Complainant,

against

Coos Bay, Roseburg & Eastern Railroad & Navigation Company, a corporation organized and existing under the laws of the State of Oregon, and a citizen and inhabitant thereof; and T. R. Sheridan, J. W. Bennett, R. A. Graham, F. H. McLean, O. J. Seeley, J. B. Hassett and W. H.

Trelease, citizens of the State of Oregon,
and inhabitants thereof,

Defendants.

“It is hereby stipulated, consented and agreed that the answer interposed herein by the defendant Robert A. Graham be withdrawn, and that the complainant may have judgment as prayed for in the complaint, except the relief prayed for in the third division of the prayer of said complaint to the effect that judgment be entered in favor of the defendant Coos Bay, Roseburg & Eastern Railroad & Navigation Company against the defendant Robert A. Graham for funds alleged to have been improperly diverted by the said Graham from the said railroad, and that such judgment be entered without costs as against the defendant Robert A. Graham and without further notice.

Dated New York, February 8, 1905.

R. A. GRAHAM,

Defendant.

WILLIAMS, WOOD & LINTHICUM,

Solicitors for Complainant.

State of New York,

County of New York,—ss.

On this 8th day of February, 1905, before me personally came Robert A. Graham to be known and known to me to be the person described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

SARAH A. SINNIGAR,

Notary Public, Kings County, Certificate filed in
New York County.

(SEAL)

Endorsed as follows:

"In the Circuit Court of the United States, for the District of Oregon," with the title of the case, "Stipulation withdrawing answer." "U. S. Circuit Court, filed July 19, 1907. J. A. Sladen, Clerk, District of Oregon."

MR. DUNNE: The other stipulation is:

*In the Circuit Court of the United States for the
District of Oregon.*

The Farmers' Loan & Trust Company, a corporation created by and under the laws of the State of New York and a citizen of the State of New York,

Complainant,

against

Coos Bay, Roseburg & Eastern Railroad & Navigation Company, a corporation created by and existing under the laws of the State of Oregon, and a citizen of the State of Oregon, and W. S. Chandler, receiver of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, a citizen of the State of Oregon; The Beaver Hill Coal Company, a corporation created by and existing under the laws of the State of Ore-

gon and a citizen of the State of Oregon;
and Z. T. Siglin, J. N. Nosler, T. R.
Sheridan, Eugene O'Connell, citizens of
the State of Oregon; Flanagan & Bennett
Bank, a corporation organized under the
laws of the State of Oregon and a citizen
thereof, substituted for J. W. Bennett and
James Flanagan, administrator of the
partnership of Flanagan & Bennett, and
J. T. Nosler, administrator of the estate
of Matilda E. Nosler, deceased, a citizen
thereof; and Beaver Coal Company, a cor-
poration organized under the laws of the
State of California and a citizen thereof,

Defendants.

It is hereby stipulated, consented and agreed that
the petition of intervention interposed and filed herein
by Robert A. Graham on or about the 4th day of
October, 1904, be withdrawn and that an order dismiss-
ing the said petition of intervention on the merits with-
out costs against the petitioner may be entered accord-
ingly.

Dated February 8, 1905.

R. A. GRAHAM,

Petitioner.

TURNER, RALSTON & HORAN,

WILLIAMS, WOOD & LINTHICUM,

Solicitors for Complainant.

State of New York,
County of New York,—ss.

On this 8th day of February, 1905, before me personally came Robert A. Graham to be known and known to me to be the individual described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

SARAH SINNIGAR,

Notary Public, Kings County, Certificate filed in
New York County.

(SEAL)

And endorsed with the title of the court and cause, "Stipulation withdrawing intervention petition, U. S. Circuit Court, filed March 24, 1905, J. A. Sladen, Clerk, District of Oregon."

MR. McNAB: I offered, if your Honor please, the dismissals in both those cases, it being our contention that neither of these stipulations were ever acted upon.

R. A. GRAHAM resumes the stand.

THE WITNESS (Continuing): In this same transcript to which reference has been made I gave the following testimony:

“ Q. Now, when you signed this stipulation of “February 8, 1905, for the dismissal of these suits “in the Federal Courts, what was the arrangement “or understanding or agreement between you and “the representatives of the J. D. Spreckels Bros.

"& Company and the Farmers' Loan & Trust Company in regard to it?

" A. About August or September, 1904, Mr. "A. B. Spreckels was in New York that fall prior "to this stipulation, this stipulation is the spring "of 1905, and he sent a broker to me, Mr. George "Crough, to negotiate with me for to dismiss these "proceedings out here as against the railroad company and against the Spreckels people and to "allow a reorganization of the road so that the "building might go on from Myrtle Point to Roseburg. The Farmers' Loan & Trust Company "at the same time had negotiations with my attorney "in New York with the same object in view that "Mr. Spreckels had represented to them, and that "Mr. Couch Flanders had also discussed it with "them, that all this litigation might be stopped and "reorganization take place and go on and build "the road to Roseburg, so we would get all our "money out of it. I agreed to that on conditions "only that if the reorganization did not take place "and if the road was not built on to Roseburg, that "then my claim against the Coos Bay, Roseburg & "Eastern Railroad & Navigation Company for "salary, which was the only thing that I claimed "off of them at that time would not be jeopardized."

At that time my attorney in New York was Mr. Thomas D. Rambautt. He drew these dismissals. I signed it in his office, February 8, 1915. When I signed the stipulations for dismissal I sent them to Mr. A. B.

Spreckels personally. I tried to find a copy of the letter that I sent to Mr. Spreckels; but I could not find it. When I was in New York I inquired of Mr. Rambautt's office in an endeavor to find the paper. I was not able to get it.

Q. Well, in substance, what did you say in that letter to Mr. Spreckels?

A. I do not recall the substance of the language. It was a very short letter, but I am not able to recall the substance of it as I have no dates—no memorandum with me.

MR. DUNNE: Have you any recollection at all of what you said in that letter?

MR. PIPES: Mr. Dunne, have you got the letter?

MR. DUNNE: The original, no, I have not.

MR. PIPES: Have you a copy?

MR. DUNNE: Yes, I have a copy.

MR. McNAB: Well, we ask you to produce it.

MR. DUNNE: I was endeavoring to test the witness' memory.

MR. McNAB: I object. I insist under the rules of evidence we are here following and I ask for its production.

MR. DUNNE: As the original is not available and not procurable I suppose I am entitled to prove its contents, to inquire as to its contents—perfectly forensic, as it is secondary evidence and I am asking

this witness to state the contents of that letter as best he remembers.

MR. McNAB: Do I understand you have a copy?

MR. DUNNE: Yes.

MR. McNAB: I ask you to produce the copy.

MR. DUNNE: I will produce after the court makes the ruling; if His Honor directs me not to proceed with this examination but to produce the letter, I will follow the directions of the court.

COURT: Inasmuch as the original is not in existence, you have a right to ask this witness the contents.

MR. DUNNE: I will proceed then to do so.

MR. PIPES: I was going to say, Your Honor, that the rule in this state, as I understand it, is when a witness is examined concerning a letter that he wrote, the letter must first be shown him.

COURT: That is so if it is in existence.

MR. PIPES: The copy is here. I suppose there will be no dispute about that, that this is a copy of the letter, and he is entitled to that for the reason that the procedure does not tolerate the asking of the witness a lot of questions to trap him when the paper is there and may be shown him. It is fairness to the witness.

COURT: That is true if original, but I don't know that he is entitled to the production of a copy; that is only secondary evidence.

MR. PIPES: We admit it is a copy.

COURT: If Mr. Graham has any recollection about it.

Q. Please state your recollection of the contents of that letter.

A. I haven's got any recollection of my own of the contents of the letter other than that I was sending him a copy of the letter—sending him the letter and suggesting to him that now that the litigation might be closed up in this kind of a way what was his conclusions about the life insurance policy.

Q. Do you remember anything else in that letter?

A. No; I hoped—other than I think I mentioned there that I hoped that the circumstances which led me up to the signing of the stipulation would be carried out.

Q. Now, do you remember anything further?

A. No, I don't recall anything further than that.

MR. McNAB: I insist if counsel desires to be fair to witness and says he has in his possession an instrument which he says is a copy, that he should present it to witness.

Q. I now show you this letter and ask you if that is a copy of the letter which you sent to Mr. Spreckels?

MR. McNAB: Before you answer the question, Mr. Graham, I will take a look at the letter.

Q. Is that a copy of the letter?

MR. McNAB: Just a moment, please.

MR. DUNNE: I think I am entitled to that.

MR. McNAB: I think not, Your Honor.

MR. DUNNE: I have a right without interruption, I submit subject to correction, to have him identify the copy.

MR. McNAB: That would be quite true if they could produce the original. Where is the original?

MR. DUNNE: The original we have not.

MR. McNAB: How, have not?

MR. DUNNE: Because we have been unable to find it. I think, if you want to know, Mr. McNab, my best impression about it is they were destroyed in the fire; but fortunately, if you will permit me to use that word, we had the copy.

MR. McNAB: We have no objection to the witness answering the question.

Will you answer the question, please?

A. Yes sir. I have no knowledge of ever having written such a letter as this. The one particular reason why I have no knowledge of ever writing it is that had I written it, it is not truthful. My attorney Mr. Rambautt—it says here, “I am doing this of my own motion without knowledge of my lawyers.” Mr. Rambautt was my lawyer; he drew the stipulation up; he had knowledge of it. It was at his suggestion the way it was drawn up.

Q. I want to ask you the question, and I want you to answer it directly if you can, is or is not this a copy of the letter with which you enclosed the dismissals, or stipulations for dismissals to Mr. A. B. Spreckels?

A. It is not.

MR. DUNNE: Now, if your Honor please, at this time I am going to read this letter and I will promise to connect it—that it is a copy of the letter

THE COURT: Prove it is a copy of the original and account for the original?

MR. DUNNE: Yes.

MR. McNAB: I object to it being read as a part of the cross examination of the witness, if your Honor please.

THE COURT: Well, as a part of their case.

PLAINTIFF'S EXCEPTION No. 11.

(The copy of the letter is marked "Defendant's Exhibit A," and is as follows:)

" Room 512, 52 Broadway, New York City.

" Wed. February 8, 1905.

"Mr. A. B. Spreckels,

" San Francisco, Cal.

"Dear Sir:

" The enclosed papers will explain themselves,
"and I trust you will receive them in the same spirit
"they are sent. It would only be adding insult to
"injury for me to enter into any elaborate discussion to point out to you that I am doing you a
"kindness and myself a great injustice, I am not.
"I am doing this of my own motion without the

“consent or knowledge of my lawyers, and with only
“two motives. One is I am sorry for the annoyance
“and trouble I have caused you by getting you
“into Oregon and will make further reparation
“when I can by getting you out as near whole as
“I can.

“ And the other is that the litigation here with
“Harriman has been so long drawn out and the
“end is not yet in sight, that I am broke. While
“I have no apprehension as to the final result here,
“I have got to husband my resources, which are now
“limited to what I can earn to carry on the war
“with and pay expenses. And until this is ended
“and I have received something substantial from
“the results, I will have nothing to offer you to
“turn the property back to me for, provided of
“course you want to discontinue the control of it
“at that or any other time. The decisions we have
“had here and the last one which we have recently
“received is all that I could ask for, but it is now
“evident that I can only get the benefits when the
“Supreme Court has had its last say, as it seems
“to be their policy to end nothing until the last
“ditch has been crossed, with the hopes that I will
“fall down by the wayside for the lack of money
“to carry on the fight with, and I understand from
“them that Harriman is amply justified in this con-
“clusion by what appears to him to be reliable in-
“formation which he is receiving abundantly from
“Oregon. If these papers meet with your approval
“as far as they go, and they are insufficient to attain

“the object which I have in view, viz., to dismiss
“and settle the whole proceedings forever, I shall
“supply them upon hearing from you.

“ I am,

“ Yours truly,

“ (Signed) R. A. GRAHAM.

“ Since having those papers prepared, I have
“been laid up sick and that gave me time to think
“about that insurance policy on my life. As it
“seems to be the only thing unadjusted between us,
“what can you do in the matter in justice to your-
“selves? Yours, R. A. G.”

MR. DUNNE: I have no further questions to
ask this witness.

RE-DIRECT EXAMINATION.

THE WITNESS: I was in New York about the
date that this copy bears which has been produced by
counsel for defendant. At that time I did not meet Mr.
John D. Spreckels in New York, and I did not have
any knowledge Mr. John D. Spreckels was in New
York at the time this letter was written. I met Mr.
John D. Spreckels in New York City after the ex-
ecution of the agreement of June 8, 1899, on two
occasions. I first met him early in December, 1899,
about the 4th of December. I am able to refresh my
memory from my memorandum. I will read the memo-
randum:

“ I called on Marsden this A. M. He told me
“J. D. S. was in town trying to sell bonds for his

“steamship line. I found him at the Waldorf Hotel and had a minute with him.”

J. D. S. is inteded to be John D. Spreckels. Mr. Marsden is President of the Farmers' Loan & Trust Company of New York, who is the trustee of these bonds. I saw Mr. Spreckels again on December 5, 1899. I will read my memorandum:

“ Seen J. D. S. at the Farmers' Loan & Trust Company's office. I asked him if he thought he should let Prestion carry on a warfare against me. He said Prestion was without authority to talk. I told him authority or not, the result was the same. He said he would see Huntington as they needed the money.”

At the time that I sent forward the stipulation which have been testified to, for these two pending suits, I certainly did not have any knowledge that the defendant John D. Spreckels & Bros. Company was going to attempt to sell out to the Southern Pacific without joining with me in disregard of my rights. I did not commence this suit until they had so sold. Referring to the transcript which has been alluded to in this case at page 107, when I was asked by counsel for defendant whether or not this question was asked me and this answer given: “Now, this is true as stated in this answer, is it not, Mr. Graham? A. That answer was correct as we understood it at that time.” I am now referring to the answer to which counsel for plaintiff called my attention the other day containing the admission in regard to the ownership of the stock, but

denying it as to bonds. I had not examined the contents of the answer at that time. I did not have it called to my attention that this admission was in it until my present counsel called it to my attention in connection with this suit last fall. That suit was merely a question of salary. In that suit there was no question involved that is in the present suit. In the occasion when these words were read to me, "I hereby acknowledge due receipt of satisfaction of judgment herein mentioned. January 5, 1900." I was then testifying. They were presenting me this receipt which they claimed I signed at the Bank of California. I admitted signing the receipt. I then denied, as I now deny, that I received any papers.

MR. McNAB: Turning to page 130 of the transcript, concerning which you were asked some questions as to how you had testified in the Merchant suit, you are quoted in the transcript as giving this answer: 'Q. Did you not cause all the costs and expenses of making said betterments and improvements to be charged up to the Beaver Hill Coal Company while you were manager or in control of said company?' And you answered, 'No, only part of them prior to December, 1897. On June 8, 1899, a final settlement was made between the Beaver Hill Coal Company, J. D. Spreckels Brothers Company and me. Under the terms of that settlement the Beaver Hill Coal Company and J. D. Spreckels Brothers Company relinquished all claims they had or claimed to have against me or my property for moneys expended in any way by me on this or any other property for improvements on the

development of coal mines or coal lands, or for anything else. "You so testified, did you? A. Yes sir, I think so. Were you then testifying that they had released or agreed to release? A. They had agreed to release." I also testified in that same transcript, pages 136 and 137:

" About August or September, 1904, Mr. A. B. "Spreckels was in New York that fall prior to this "stipulation, this stipulation is the spring of 1905, "and he sent a broker to me, Mr. George Crouch, "to negotiate with me for to dismiss these proceed- "ings out here as against the railroad company and "against the Spreckels people and to allow a re- "organization of the road so that the building might "go on from Myrtle Point to Roseburg. The "Farmers' Loan & Trust Company at the same time "had negotiations with my attorney in New York "with the same object in view, that Mr. Spreckels "had represented to them and that Mr. Couch "Flanders had also discussed it with them, and that "all this litigation might be stopped and reorgan- "ization take place and go on and build the road "to Roseburg, so we would all get our money out "of it. I agreed to that on conditions only that "if the reorganization did not take place and if "the road was not built on to Roseburg, that then "my claim against the Coos Bay, Roseburg & "Eastern Railroad & Navigation Company for "salary, which was the only thing that I claimed of "them at that time, would not be jeopardized"

and I so testify now. With reference to the transaction of June 8, 1899, I did not "understand by the terms 'a complete adjustment of all differences between the parties'" that in the event that I failed to pay the sum of five hundred and fifty thousand dollars within six months' the transaction was still to remain open indefinitely. I did not understand that it was going to remain indefinitely. I intended that the transaction was closed up on the settlement of the \$550,000, which I agreed to pay them in six months; I gave them two and a half times the value of their claim in securities. I was not giving them two and a half times the value of their claims in securities with the view that I was going to be closed out at the end of six months without any further redress. I assumed, as Mr. Garber had advised me, that I was giving them a mortgage and that the liens would have to be foreclosed and sold in a general orderly process of the law instead of doing it with a mob as they did it in Marshfield on December 18th of the same year. When I was asked on my cross-examination concerning some correspondence had with Mr. A. B. Spreckels relative to whether or not he had promised to give me the Beaver Hill Coal Company's stock and my life insurance policy, I was not presented with all the correspondence on that subject.

(Counsel for plaintiff shows witness original letter, dated April 27, 1898, addressed to A. B. Spreckels, Esq., and bearing mark "Defendant's Exhibit No. 26.")

THE WITNESS (Continuing): Upon being shown this last above mentioned letter I recognize that

letter. It is the original of a letter that I mailed to Mr. A. B. Spreckels on that day. It was received by me from Messrs. Garber & Garber.

(Counsel for plaintiff shows witness reply to letter, dated the following day.)

THE WITNESS (Continuing): I received that reply.

(Counsel for plaintiff offers the letters in evidence, which were admitted by the Court and marked "Complainant's Exhibit No. 40," being the Graham letter, and "Complainant's Exhibit No. 41," being the Spreckels letter.)

(Plaintiff Exhibit No. 40 is as follows:)

" Palace Hotel, San Francisco, Cal.,

" April 27, 1898.

"A. B. Spreckels, Esq.,

"Dear Sir:

" Answering your favor of this date, I am surprised and also sorry we should have two opinions
"in regard to this stock and insurance policy. I
"had hope that probably a little time would have
"worn off the ruffled edges and an amicable arrangement be made, whereby our mutual interests
"might be gotten together in a way that it would
"be creditable both to our business ability and at
"the same time protect our vast investment: and
"without trying to lay the foundation for a law
"suit, but to arrive at a clearer understanding,

“would you kindly tell me under what pretext you
“hold the stock? If it is collateral security to the
“note why does not the note say so? You, your-
“self, conceded to me and used as an argument for
“charging the management in the Beaver Hill Coal
“Company that you alone were putting up the
“money and that if you mismanaged it, it was none
“of my business—I was not responsible for the
“money spent. This was also the language used
“by Mr. Samuels at a different time. This is the
“view I took of it and one of the things that in-
“fluenced me in letting you have the management,
“and with both of us agreeing in this point you
“certainly should not hold my stock on the ground
“that I owe you as a stockholder of the Beaver Hill
“Coal Company, and it certainly was my under-
“standing and I never thought you had any dif-
“ferent one that you would send the stock and
“policy to me at Marshfield and this I requested
“you to do and you certainly promised to do so
“when I gave you the note. Otherwise why should
“I have closed an open account with a cut-throat
“note unless I was getting some relief in some other
“direction? I am sure a moment’s reflection on your
“part with your desire for fair dealing will enable
“you to see the justice of my claims and you offered
“no objection to it at the time, but conceded in
“the most open manner possible that the stock and
“policy would be released.

“ I would be glad to hear from you today as I
“am trying to get ready to go to Oregon tonight or

“tomorrow. The term of court commences next
“week up there and a fellow is suing the railroad
“company for \$10,000 damages. Last fall he backed
“his team over a cut in the railway close to the
“county road and killed his wife and hurt himself.
“I don’t think there is any merit in the claim but
“I must go tomorrow. Hoping to hear from you
“favorably on this point, I am,

“
Very truly,

“
R. A. GRAHAM.”

“COMPLAINANT’S EXHIBIT No. 41.”

(The answer is on the letterhead of J. D. Spreckels
& Brothers Company.)

“
San Francisco, Cal., April 28, 1898.

“R. A. Graham, Esq.,

“
Palace Hotel, City.

“Sir:

“
I am in receipt of your letter of April 27th.
“I must call your attention to the fact that we have
“charged you with the unauthorized diversion of
“funds received by you as trustee for the Beaver
“Hill Coal Company, from the purposes for which
“you received them, and that you have appropriated
“the same to your own use. Upon asking for an
“account you refuse and threaten to bring suit. It
“must be evident, even to the most ordinary mind,
“that we cannot under the circumstances continue

“any correspondence of a business nature with
“you.

“Respectfully,

“ J. D. SPRECKELS & BROS. COMPANY,

“ A. B. Spreckels, President.”

THE WITNESS (continuing:) That is the answer I received to my letter. I never refused to give an accounting or a statement of my account to J. D. Spreckels & Bros. Company. I finally believed it necessary for me to commence a receivership suit for the Beaver Hill because I thought they were handling the management of the Beaver Hill very badly and they were jeopardizing my interest. The situation at the Beaver Hill properties at that time was that the Beaver Hill Coal Company was idle. It was doing nothing, and the railroad was starving to death for want of some business and freight that should be supplied as thought from the Beaver Hill Coal Company. Three or four different men kept the accounts of the Beaver Hill Coal Company and the Coos Bay, Roseburg & Eastern Railroad & Navigation Company; the head of the office was J. B. Hassett; under Hassett in charge of the Beaver Hill Company's books was De Neveu, and there was another man in the office by the name of Bingham and another by the name of Marsden. Personally I never kept any books; I never made a mark in a book in my life. I never took to my own use, or misappropriated one dollar of the funds of the Beaver Hill Coal Company or the Coos Bay Railroad Company. The circumstances in the affidavits relative to my desire

that the company should acquire other lands for coal, referred to in affidavits presented here, are that I thought it was very necessary. The Beaver Hill Coal Company's lands were in the center of the coal bearing lands on both sides of them. The vein of coal was running into both sides of these pieces. We were sandwiched in between two larger pieces with $\frac{3}{4}$ of a section of land. We had not room to go in either direction from a very extensive slope that we had built. So when we got down in our slope some 700 feet and drove gangways off, the distance from the slope to the company's lines on each side of our gangway would be limited to the width of our own 480 acres of land. I said it would be advisable and preferable that we should have the Chadwick tract as we could buy it from the owners at \$16.50 an acre; the Chadwick lands were additionally very valuable for timber. After I was removed from office Mr. A. B. Spreckels purchased a one twenty-fourth interest in this land, which was the only interest which was available to purchase, unless they had taken the bond that I had previously procured from Mr. Sol Hirsch and from Senator J. M. Dolph who owned a one-twelfth interest in it.

(Counsel for plaintiff shows witness letter written by J. B. Hassett to the Beaver Coal Company.)

THE WITNESS (Continuing): Upon being shown this letter I state that it is a letter written by J. B. Hassett of the Beaver Hill Coal Company introduced in evidence in San Francisco.

(Counsel for plaintiff offers letter in evidence, which is marked "Complainant's Exhibit No. 42," and is as follows:)

"COMPLAINANT'S EXHIBIT No. 42."

" Marshfield, Oregon, Feb. 25th, 1898.

"The Beaver Hill Coal Co.,

"Dear Sirs: In reply to yours of February 23rd, 1898, to the Coos Bay, Roseburg & Eastern Railroad & Navigation Company the last named company notifies you that said company will reduce the freight to the former rate charged on coal which was fifty cents per ton, providing that your company will furnish, on the average, one hundred tons per day for transportation, and this company would further say that it will make a reduction of ten cents per ton on each one hundred tons per day over that and so on down until the freight is down to thirty cents per ton. The average to be computed monthly.

" Yours respectfully,

" J. B. HASSETT.

"Sec. of Coos Bay, Roseburg & Eastern Railroad
" & Navigation Co."

THE WITNESS (Continuing): from the time that I was removed as manager of the Beaver Hill Coal Company I did not take any action relative to the management of the Coos Bay Railroad which I believe to be embarrassing to the Coal Company. I had every

reason in the world not to do so. If I had taken any steps to embarrass them it would have been very embarrassing, if they had resented it, very difficult for the railroad company to get along because the railroad had no traffic of any consequence except what the Beaver Hill Coal Company was providing it. I attended from time to time the meetings of the Beaver Hill Coal Company; nobody to my knowledge until these disputes came up, ever denied to me that I was a stockholder in that company. I don't remember making motions at the meetings of the company; I don't recall that. I had the same privileges, I suppose as any other director.

(Counsel for plaintiff introduces in evidence the Articles of Incorporation of the Beaver Hill Coal Company.)

MR. McNAB: If your Honor please, the particular portion to which I direct your attention being the names of subscribers, number of shares and amounts: R. A. Graham, 2500 shares, \$250,000.

(Counsel for plaintiff offers in evidence Articles of Incorporation of Beaver Hill Coal Company.)

“KNOW ALL MEN BY THESE PRESENTS, That we, the undersigned, a majority of whom are citizens and residents of the State of California, have this day voluntarily associated ourselves together for the purpose of forming a corporation under the laws of the State of California.

And we hereby certify:

First: That the name of said corporation shall be The Beaver Hill Coal Company.

Second: That the purposes for which it is formed are:

1. To engage in the coal and in the wood, lumber and lumber milling business.

2. To purchase, acquire, hold, dispose of, sell, mortgage, lease and take leases of coal and timber lands.

3. To work coal mines and to engage in all operations proper therefor, to buy and sell coal, and to import and export the same.

4. To operate lumber mills, to buy and sell timber and lumber, and to engage in all operations deemed proper for carrying on the lumber and milling business.

5. To acquire, build, use, own, manage, sell, dispose of, charter and give charters of ships, vessels and any and all sorts of water craft.

6. To erect wharves, piers and other structures and construct any and all sorts of buildings, trams, flumes, improvements that may be deemed advisable or useful in carrying on any business engaged in by this corporation.

7. To acquire, hold, dispose of, lease, mortgage or take leases of real and personal property, and to acquire rights, privileges and franchises.

8. To make any and all contracts not prohibited by law.

9. To subscribe for, purchase, own, hold, sell and dispose of shares of stock in other corporations.

10. To do any and all things that may be deemed necessary, or proper, or advisable to carry on any business in which this corporation may engage, or to further its interests in any regard.

Third: That the place where the principal business of said corporation is to be transacted is the City and County of San Francisco, State of California.

Fourth: That the term for which said corporation is to exist is fifty years from and after the date of its incorporation.

Fifth: That the number of Directors or Trustees of said corporation shall be five and that the names and residences of the Directors or Trustees who are appointed for the first year and to serve until the election and qualification of such officers are as follows, to-wit:

(Signed)

ADOLPH B. SPRECKELS,
San Francisco, California.

JOHN D. SPRECKELS,
San Francisco, California.

F. S. SAMUELS,
San Francisco, California.

CHARLES A. HUG,
San Francisco, California.

R. A. GRAHAM,
San Francisco, California.

Sixth: That the amount of capital stock of said corporation is (\$500,000) Five Hundred Thousand Dollars, and the number of shares into which it is divided is Five Thousand (5,000) of the par value of One Hundred Dollars (\$100.00) each.

Seventh: That the amount of said capital stock which has been actually subscribed is Five Hundred Thousand Dollars and the following are the names of the persons by whom the same has been subscribed, to-wit:

Names of Subscribers	No. of Shares	Amount
Adolph B. Spreckels	1240	\$124,000
John D. Spreckels	1240	124,000
F. S. Samuels	10	1,000
C. A. Hug	10	1,000
R. A. Graham	2500	250,000

In Witness Whereof we have hereunto set our hands and seals this ninth day of March, A. D. 1895.

Signed and sealed in the presence of:

R. T. Guard.

A. B. SPRECKELS,
JOHN D. SPRECKELS,
FRED'K S. SAMUELS,
CHAS. A. HUG,
R. A. GRAHAM.

State of California,
City and County of San Francisco,—ss.

On this ninth day of March, A. D. 1895, before me,
James L. King, a Notary Public in said City and

County of San Francisco, State of California, personally appeared Adolph B. Spreckels, John D. Spreckels, F. S. Samuels, C. A. Hug, and R. A. Graham, known to me to be the persons whose names are subscribed to and who executed the within instrument, and they and each of them acknowledged to me that they and he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Official Seal, the day and year last above written.

(Seal)

JAMES L. KING,

Notary Public in and for the City and County of San Francisco, State of California.

State of California,

City and County of San Francisco,—ss.

I, County Clerk of the City and County of San Francisco, State of California, do hereby certify the within to be a full, true and correct copy of Articles of Incorporation of the Beaver Hill Coal Company, as remains on file in this office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Official Seal, this day of March, A. D. 1895.

(Seal)

.....

(Counsel for plaintiff offers in evidence the Minutes of the First Stockholders' Meeting of the Beaver Hill Coal Company contained on pages 9, 10 and 11, for the purpose of showing that among the stockholders present at that time was R. A. Graham, 2500 shares.)

FIRST STOCKHOLDERS' MEETING OF THE BEAVER HILL COAL COMPANY.

We, the undersigned, stockholders and subscribers for stock of the Beaver Hill Coal Company, being the owners and holders of all the subscribed capital stock of the company, Adolph B. Spreckels, John D. Spreckels, F. S. Samuels, C. A. Hug, and R. A. Graham, do hereby give our written consent to the holding of this, the first stockholders' meeting of the Beaver Hill Coal Company, this tenth day of May, 1895, at the hour of 11:30 o'clock A. M., at 327 Market Street, in the City and County of San Francisco, State of California, and we do hereby certify that all the stockholders and subscribers for stock in said Company are at this meeting now here present.

IN WITNESS WHEREOF we have hereunto subscribed our names this tenth day of May, 1895.

A. B. SPRECKELS,
JOHN D. SPRECKELS,
FRED'K S. SAMUELS,
CHAS. A. HUG,
R. A. GRAHAM.

Pursuant to a call and notice to be given and the above written consent, this, the First Meeting of the Stockholders of the Beaver Hill Coal Company was held on this tenth day of May, 1895, at 11:30 o'clock A. M. at 327 Market Street, in the City and County of San Francisco, State of California.

Present Five Thousand Shares, owned, held and represented as follows, namely:

Adolph B. Spreckels	1240 shares
John D. Spreckels	1240 shares
F. S. Samuels	10 shares
C. A. Hug	10 shares
R. A. Graham	2500 shares

being all the shares of the subscribed capital stock of the Company.

Mr. A. B. Spreckels, President, was in the chair. The Secretary read the minutes of the meeting held this day, of the persons named in the Articles of Incorporation, who were appointed as directors for the first year, which, on motion duly seconded, were approved.

On motion of Chas. A. Hug, the appointment of A. B. Spreckels, John D. Spreckels, F. S. Samuels, C. A. Hug and R. A. Graham to serve as directors for the corporation for one year and until their successors shall be elected and qualified and ratified, confirmed and approved.

The President then announced that the first business of the meeting was the adoption of the code of by-laws for the Government of the Company and of its officers. Mr. R. A. Graham presented a code of by-laws which, having been read and discussed, were, on motion of Mr. A. B. Spreckels, seconded by Mr. F. S. Samuels, adopted as the by-laws of the Company

and ordered to be engrossed in the company's book of by-laws.

Mr. Chas. A. Hug stated to the meeting that the coal and timber lands situated in Coos County, State of Oregon, and described as follows, to-wit: being the North one-half ($\frac{1}{2}$) and the Southwest one-fourth ($\frac{1}{4}$) of Section 17, and the Northeast one-fourth ($\frac{1}{4}$) of Section 19, all in Township 27 South, of Range 13, West of the Willamette Meridian, could be purchased from Mr. A. B. Spreckels for the sum of \$500,000, which Mr. Spreckels was willing to receive in the fully paid-up stock of the Company to be issued to the subscribers to the Articles of Incorporation in the amounts for which they had made their subscriptions. It was, thereupon, on motion of Mr. F. S. Samuels, duly seconded, unanimously resolved that the Board of Directors be and that they are hereby authorized to purchase from Mr. A. B. Spreckels the said coal and timber lands for the sum of \$500,000, to be paid for in shares of stock of this Company to be issued to the subscribers to the Articles in the amounts for which they had respectively subscribed.

There being no further business before the stockholders, on motion the meeting adjourned.

FRED'K S. SAMUELS,

Secretary.

A. B. SPRECKELS,

President."

THE WITNESS: That is the coal land which was known as the land embraced in the Norman contract.

(Counsel for plaintiff also offered in evidence the Minutes of the Directors' Meeting to be found on pages 12, 13 and 14 of the same book, which are as follows:)

“DIRECTORS’ MEETING.

Held on the tenth day of May, 1895.

The meeting was called to order by Mr. A. B. Spreckels, President of the Board. The Secretary read the minutes of the previous meeting of the Board, held for the purpose of organization, and on motion of Mr. Chas. A. Hug, seconded by Mr. R. A. Graham, the same were approved.

The President then instructed the Secretary to read to the Board the Code of By-Laws adopted by the stockholders at their First Meeting, held this tenth day of May, 1895. The same being read, on motion of Mr. F. S. Samuels, seconded by Mr. R. A. Graham, it was unanimously:

RESOLVED, That the Code of By-Laws adopted by the Stockholders of the Beaver Hill Coal Company at their First Meeting held on the tenth day of May, 1895, (and engrossed on pages 1, 2, 3, 4, 5, 6, 7, 8 and 9 of the book of By-Laws of this Company) be adopted and accepted as the By-Laws of this Company. And be it further

RESOLVED, That the members of the Board of Directors and the Secretary of the Company be and they hereby are, and each of them is requested to subscribe to the said By-Laws and to certify the same.

On motion of Mr. F. S. Samuels, duly seconded, it was unanimously:

RESOLVED, That the office of the Company be and it is hereby fixed at 327 Market Street, in the City and County of San Francisco, State of California.

On motion of Chas. A. Hug, duly seconded by Mr. R. A. Graham, it was:

RESOLVED, That that certain certificate of stock which is affixed to the margin of this page, be adopted as the certificate of stock of this Company, and that the Secretary be instructed to procure a book of 250 certificates of stock of the design here adopted. The Secretary was, thereupon, by the President so instructed.

On motion of R. A. Graham, duly seconded, it was:

RESOLVED, That the Company adopt as its seal that certain seal, an impress of which is made on the margin of this page and bearing the words 'Beaver Hill Coal Company, Incorporated, March 22d, 1895.'

On motion of R. A. Graham, seconded by F. S. Samuels, it was:

RESOLVED, That the Company purchase those certain coal and timber lands and premises situated in

the County of Coos, State of Oregon, and being the North one-half and the Southwest one-fourth of Section 17 and the Northeast one-fourth of Section 19, all in Township 27 South of Range 13 West of the Willamette Meridian, for the sum of \$500,000, from A. B. Spreckels. Mr. A. B. Spreckels signified his willingness to accept the paid up stock of this company for said \$500,000, which said stock said A. B. Spreckels desired to have issued to the subscribers to stock of this Corporation in the amounts for which their subscriptions have been given. It was, on motion of Chas. A. Hug, duly seconded, further

RESOLVED, That the President and Secretary of the company be and they hereby are authorized to issue to the subscribers to the stock of this Company, certificates for shares of stock to the amounts for which they have given their subscriptions in consideration of the execution and delivery to the Company of a deed of conveyance by Mr. A. B. Spreckels of the above described property.

On motion of Chas. A. Hug, duly seconded, it was:

RESOLVED, That Mr. R. A. Graham be and he hereby is authorized to act for the Company in the State of Oregon and about the conduct of the mining and timber properties purchased from Mr. A. B. Spreckels, with power to employ and discharge men, purchase materials, implements, and supplies, and to sell coal within the State of Oregon, also under the direction of the President of the Company, to do such other

acts and things as he may be specially directed and authorized to do.

No further business coming before the Board, the meeting was adjourned.

FRED'K S. SAMUELS,

Secretary."

(Counsel for plaintiff offers in evidence the Minutes of the Stockholders' Meeting to be found on page 19, as follows:)

"STOCKHOLDERS' MEETING.

San Francisco, May 13th, '96.

The adjourned Regular Annual Meeting of Stockholders of the Beaver Hill Coal Company was held at the Company's office, 327 Market Street, on Wednesday the 13th day of May, A. D. 1896, at ten o'clock A. M., A. B. Spreckels, President, in the chair.

The meeting was called in pursuance of a notice personally served on each stockholder, to elect by ballot a Board of Directors, to serve for the ensuing year, or until their successors are elected and qualified, and to transact such other business as may legally come before the meeting.

The roll of stockholders being called, it was found that the entire capital stock was represented, as follows:

A. B. Spreckels.....	1240 shares
J. D. Spreckels.....	1240 shares
F. S. Samuels.....	10 shares

Chas. A. Hug..... 10 shares

R. A. Graham.....2500 shares

The meeting then proceeded to business. The minutes of the last annual meeting, held on May 10th, 1895, were then read and approved.

The next business being the election of Directors, the chair declared nominations in order.

On motion, duly seconded and carried, the following were nominated: A. B. Spreckels, J. D. Spreckels, F. S. Samuels, Chas. A. Hug, R. A. Graham.

By a unanimous vote, the Secretary was instructed to cast the ballot, which being done, the Chairman declared the above named gentlemen elected Directors to serve for the ensuing year.

There being no further business, on motion, the meeting adjourned.

FRED'K S. SAMUELS,

Secretary."

THE WITNESS (continuing): Referring for a moment to the period before I signed the note dated November 1, 1897, the agreement between the Spreckels Brothers Company and myself, on what was known as the railroad account, or any other account that I owed them, was that they were to get their money out of the proceeds of the sale of the bonds. They had the first call on the money we got out of the sale. In those conversations and understanding that I had with them I never had any such idea as they should get pay

any other way except from the sale of the bonds. I had nothing to pay them with. I think they knew it. Messrs. Garber & Garber retained Mr. Frohman, the attorney who has been mentioned here as representing me at the time of the drawing of this contract. He appeared for me with them.

There were two policies of life insurance mentioned in the agreement which was offered in evidence. One of them was assigned to Mr. Spreckels and was retained by them until its maturity and the premiums paid on it by them until its maturity. The other one lapsed for want of premiums. The premiums were not paid because I didn't have the money. At the time that this contract was entered into with the Spreckels by which they were to keep the premiums up on these two insurance policies and pay me \$150 a month I had no intimation or warning that they were going to discharge me from the mine and cut off the salary. In this Norman contract which was turned over to the Beaver Hill Coal Company I turned it over in exactly the same condition that I had received it from Norman. I did not receive any consideration or commission or anything of the sort. My impression of that contract was that it was drawn for \$70,000, that Norman was to receive \$70,000 for his land, but he had agreed in the contract that if I placed it with any person so that he got his money, that he would give me a commission of ten thousand dollars. I turned the contract over to Mr. A. B. Spreckels, as I remember, just as it was, with the understanding that any commission that was received from Mr. Norman, that they should get the

benefit of, not me. Therefore I have always carried it in my mind that the Norman land was for the net sum of \$60,000, as there wasn't any commission paid; and then when Norman was unable to deliver the full section and only gave us three-quarters of the section, I have always had the impression that the reduction was made for twenty-five per cent; therefore the contract price paid to Norman was reduced to \$45,000 for the three quarter sections that we received. With regard to the other land I desired to buy, I offered that to them at exactly the figures at which I held the bonds. I had nothing in view in the way of commissions or deductions. I played the game with them with all the cards on the table. They knew what I was paying for this land; there was no secret about it. They knew I was buying this land from the Chadwick people—at least should have known it from the result of many conversations I had, particularly with Mr. Samuels here, that I was getting the Chadwick tract for \$16.50 an acre. There was no commission to anybody in that. I was turning it over to them at that. They knew, or at least I am satisfied Mr. Samuels knew, that the remaining quarter section afterwards turned up to be what was known as the Klondike Mine which we had thought we bought from Norman for something approaching—well, whatever proportion that was per acre as sixty thousand was to a section; we got that from the Government at twenty dollars an acre. That is all they were paying for that section. Therefore the Beaver Hill Company had they taken the quarter section on 19 which we received from the Government,

would have gotten the quarter section for \$3200 instead of the contract that we had with Norman which was for \$15,000. From the time that I received the letter signed by John D. Spreckels in which he told me that if I had thrown myself upon his mercy and had surrendered to him all of my properties he might have been disposed to deal with me more leniently, I did not do anything to provoke that firm in any way into the actions which they took against me, if I did so unconsciously I didn't know it. I have never received one dollar for all the years that I put in the Coos Bay Railway. Other than the salary of \$150 a month that I received while I was there as its manager plus what they paid on this insurance policy I have no recollection of ever receiving a cent from the Beaver Hill Coal Company but that. The \$150 a month I received as manager went towards keeping my wife and us, but it was not quite sufficient to pay our living expenses. To make out for living expenses my wife kept boarders.

(Counsel for plaintiff thereupon offers in evidence depositions of W. L. Pierce, as follows:)

My name is William Levings Pierce; age sixty-three; residence, St. Petersburg, Florida; occupation, attorney-at-law. I have been a practicing attorney for forty-two years, with the exception of about four years, and about six years while I was engaged in creating and managing a banana plantation, during that time I was also having considerable legal business in examining titles. I commenced practicing in San Francisco in January, 1897. I was practicing in San Fran-

cisco in June, 1899. I recall that E. F. Preston was a practicing attorney in San Francisco in 1899, and that he was acting as one of the attorneys for defendant, J. D. Spreckels & Bros. Company, in connection with certain litigation and business controversies with one R. A. Graham. I was associated with E. F. Preston in representing J. D. Spreckels & Brothers Company in those matters. I recall that there was pending in 1899 in the Superior Court of the City and County of San Francisco, State of California, a suit entitled: J. D. Spreckels & Bros. Company, Plaintiff, vs. R. A. Graham, Defendant, wherein plaintiff was seeking to secure judgment on a certain promissory note, executed and delivered by said Graham to J. D. Spreckels & Bros. Company, for the sum of \$523,162.52, and for the purpose of having sold under order of court, certain collateral deposited with J. D. Spreckels & Bros. Company by R. A. Graham, to secure said promissory note, said collateral consisting of 10,001 shares of the capital stock of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and 620 of the first mortgage bonds of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, only I am not able to state from memory the exact amount of the note. I know it was for a very large sum, four hundred or five hundred thousand dollars, nor can I remember exactly what the collateral consisted of, nor the number of shares of the capital stock constituting the collateral, nor the number of the first mortgage bonds. I was employed by J. D. Spreckels & Bros. Company in connection with said suit, acting for the J. D. Spreckels Bros. & Com-

pany. I recall some of the circumstances surrounding the execution of this agreement of June 8, 1899, which has been shown to me and is marked "Exhibit A," but owing to the lapse of time I am unable to recall them all; but the incidents and circumstances which I remember, I believe I remember correctly. I was employed as its attorney by the J. D. Spreckels Bros. & Company in the suit in question, and also by the different Spreckels Companies on their behalf in the different controversies and litigations arising and pending, and contemplated with R. A. Graham, and the different interests and companies in which Graham and the Spreckels Companies were interested. Considerable litigation ensued and I drew some, and I think most of the pleadings on behalf of the Spreckels' interest in those cases, and the case you particularly mention came on for trial in the Superior Court, of the City and County of San Francisco before Judge Bahrs, if my memory serves me correctly. Mr. Preston and I represented the Spreckels' Company. Messrs. Garber & Garber, A. A. Moore and Isaac Frohman represented Mr. Graham and Mr. Graham's interests. I cannot remember distinctly of Mr. Frohman's activity in court; I chiefly remember the activity of Mr. A. A. Moore, and he was surely active. We had been engaged in the trial of this case in said court for a considerable time, which including an interruption of the trial caused by my having an acute attack of tonsilitis, lasting about ten days, must have occupied at least three weeks. When I returned to my office, Mr. Preston told me that he had been approached by some one; it seems

to me that it was Mr. Pillsbury; it is probable that it must have been Mr. Frohman instead of Mr. Pillsbury, with a proposition from Graham to settle up for all time the differences and litigations pending and contemplated between the Spreckels and Mr. Graham. My recollection is that the negotiations as yet had not proceeded far enough to warrant us in allowing the pending trial to abate, and that we continued to appear in court and the trial was resumed. After some little time, Mr. Preston said that Mr. Frohman, and here I am sure it was Frohman, and from that time I have no further recollection of Mr. Pillsbury's name being used—that Mr. Frohman on behalf of Mr. Graham made a straightforward proposal that all litigations should be stopped; that a final adjustment of all differences should be had; that everything in the nature of property and interests in property, in which the Spreckels' and Graham's claimed any interest, jointly or otherwise, or as collateral, should be turned over to a trustee in escrow; that Mr. Graham should be given a chance within a certain reasonable time to pay to the Spreckels what he owed them, the exact amount to be agreed upon, and in case when that time arrived he could not, or did not pay the same in cash, that all of said property to be so placed in escrow should be delivered over to the Spreckels and immediately Graham's interest therein to cease and everything to be ended between Graham and Spreckels.

Preston asked me what I thought of such a settlement as proposed. I said that if we could get such an agreement and make it so plain that there could be

no possible question about it being final, I could see no objection to it, and on the contrary, I approved such action, as there were so many cases pending and some more were contemplated, and there was then contemplated one or more criminal actions against Graham. I can not remember just what they were but for criminal controversies, theft or perjuries, perhaps on all these charges, and I said that the litigation would be drawn out for years, and in the end Spreckels could never get anything more than these properties offered to be placed in escrow, as Graham had nothing further, and aside from his interest in these properties was judgment proof. Preston, however, said to me that he felt very bitter against Graham, that Graham ought to be sent to prison, and that he would rather Spreckels would lose one hundred thousand dollars and have Graham in jail than to get all that was coming to him and Graham remain a free man. I told Preston that to punish Graham would be a difficult thing, and if we succeeded, it would not put Spreckels anywhere; that we would litigate for years and Graham would remain free, while Spreckels would all the time be putting up the costs.

In a day or two John D. Spreckels came into the office. Preston had informed me he was coming and asked me to be present. I walked into his office and took a small part in the conversation that ensued. Preston said he had had a further talk with Frohman, and he had changed his mind a little and was favorable to a settlement. John D. Spreckels said he was willing to give Graham time to pay out—but he well knew

Graham never would, and if we made a settlement, he wanted it fixed beyond all question that these properties mentioned, as to be turned over in escrow, would when the time arrived for Graham to pay, and he did not, be turned over to him for his companies, as their absolute properties and Graham's interest therein to then end, and end forever; said he had no confidence whatever in Graham, and would take his word for nothing. That if we made a settlement, it must be a settlement, and the last one. It was said at this interview by Mr. Preston that Mr. Frohman was preparing a draft of an agreement which would later be presented to us.

After Mr. Spreckels left the office Preston and I talked the matter over, agreed that such a settlement as John D. had demanded, and which we also agreed to must be made if any one was made, and that we would see what kind of a document Frohman got up. Later, it may have been the same day, but I think on another, Mr. Frohman came into Mr. Preston's office. Preston called me in and we read over Mr. Frohman's draft. We had an extended conversation with Frohman over it. Preston repeated to him his opinion of Graham that he would not trust him an inch, and that he well knew that if there was a loop hole anywhere in the negotiations, Graham would find it and take advantage of it. I remember both Mr. Frohman and myself laughed at Preston regarding his emphatic expressions about Graham, and his fears that we would not be able to get up a contract that would hold Graham. Frohman said Graham was not so bad; that

any man in a tight hole would fight for all he could to get out of it, but that the agreement he proposed would be so fairly and plainly drawn that neither party could wriggle out of it; that if the one he had drawn did not suit us we were at liberty to draw another and make it as strong as we liked, so that it would provide in the plainest and strongest language that the settlement would forever determine the rights of the properties beyond question, and that if Graham did not pay the money to be agreed upon on the very day agreed upon, then his interests and rights to all of the properties should cease absolutely; that they should be delivered over to the Spreckels Companies as his and their absolute properties and they could take them and do as they pleased with them. I did not say much. I listened and occasionally chipped in a few words, not many. Preston was a very good fellow but imperious and dominating. He liked to take the leading part in everything and to hold the floor until he really needed help. He was Spreckels' intimate friend and confidential adviser. I was only his employed attorney and my duties were secondary to those of Preston. I was engaged to draw the pleadings and assist in the trial of the cases and to act as adviser. As I said I did offer some observations and I heard all of the conversations at that time between Frohman and Preston. There was a good deal of it, but I think I have given the substance of all that I can recall. My best recollection is that we suggested some changes in the agreement to make it more definite and determinative, and that Frohman took away the first draft to incorporate

these changes, and came back again with another draft. This was more satisfactory. However, it is my recollection that it was not signed up in our offices. I am quite sure it was not. I do not remember seeing Mr. Graham at all during these pending negotiations, or after we quit meeting at the court room; anyway an agreement was finally drawn which satisfied Mr. Preston. It was shown to me by him and I approved it, and later Mr. Preston told me it was signed up.

In narrating the conversations I do not pretend to have given the exact language. It would be impossible for me to do so after this lapse of time. I can only give the substance of it, and am impressed with the dominating intention as expressed by Mr. John D. Spreckels, Mr. Preston, Mr. Frohman and myself, and it was carried into our conversations, that if the money was not paid when agreed, the properties were to be Spreckels properties, freed from all claim of any kind on the part of Graham, for it was there said by Preston, and I think by myself to Mr. Frohman, that we had no idea Mr. Graham could ever pay out, but this would be a good way to settle the litigation and get it out of court. I do remember now, it has just occurred to me that Mr. Frohman in the course of the conversations said that Graham could not afford to pay counsel to continue the litigation, nor the costs of witnesses and court expenses, and that he would rather take the chance of being able to raise the money at the time agreed upon than to go on with the litigation, and if he failed to raise the money, that would end it. I did not have any conversations with R. A. Graham as to the purpose

and intent, in making the agreement; I had no conversation with Mr. Graham at or during this trial, and before this agreement was signed in regard to making this agreement. I knew Mr. A. B. Spreckels and Mr. Fred S. Samuels at this time. I had very little conversations with them, or either of them as to the purpose and intent in making this agreement. I think A. B. Spreckels asked me one day how we were getting on, and I remember that Mr. Samuels, who I think was the secretary of J. D. Spreckels & Bros. Company, several times said to Mr. Preston and to me in Mr. Preston's office that he hoped that the agreement with Graham would be made so tight that there would be no come-back to it; but such conversations as occurred with Mr. Spreckels do not seem to have registered deeply in my memory, and I do not think they were important other than his anxiety that this should be a final settlement and that there never could be further litigation regarding it. I do not think I can state anything further as to any other conversations between the parties. I do not recollect seeing Mr. Frohman after the agreement was signed. As far as I can now recollect that ended my connection with these cases. That is all I can recall. There was much said but I have given the substance of it to the best of my recollection.

(Signed.) W. L. PIERCE.

(Notary's certificate.)

MR. McNAB: If your Honor please, I still am embarrassed by the situation to which I have adverted repeatedly regarding the weight which is to be given to collateral records in this matter, and independent

ex parte affidavits filed; and I think your Honor very clearly understands the policy on which we are conducting the case, and that we are bringing it on two theories, namely: that the instrument upon its face in this case shows, no matter what parties tried to do or intended to do, that it was a mortgage and security, in support of which theory we shall present to you authorities which have never been cited in the case before; and secondly, the main purpose of the case, so far as it relates to the allegations that the contract was signed up under circumstances of oppression where the debtor is entitled to relief in equity under well established authorities. We have, however, present some witnesses from Marshfield, relative to Beaver Hill Coal Mine properties, and I know no other way to protect myself under the record than to put some of that evidence in.

THE COURT: You will have to take your own course on that. I of course am not prepared to determine at this time the weight to be given to these records in evidence. I assumed that they were offered for the purpose of showing the condition of the litigation between the parties at the time of this agreement; to show what proofs were referred to and what issues were involved in those proofs and what matters were to be determined, and disposed of by the agreement. That is what I assumed. I had not assumed that the affidavits were offered or read as primary evidence of the facts stated in them; but such affidavits were on file at that time; and that they were involved in those suits that were to be determined, and perhaps

to disprove or rebut your position that this contract was made under oppression and undue influence of the Spreckels. Now, that is what I supposed those records were offered for, and for no other purpose.

MR. McNAB: Counsel do not deny, and I take it to be an adoption by them of that theory. But when I asked Mr. Dunne the other day whether or not he offered the affidavits for the purpose of proving the truth of the facts contained in them, or on the other ground, I was answered that they were offered for the purpose of proving both, and that being the case, they of course were offered as primary evidence to establish the truth of the facts contained in them.

MR. DUNNE: Pardon me, Mr. McNab. I said they were offered as *res gestae* of the controversies between these parties, and to illustrate that we were proceeding in good faith in these controversies, that we were maintaining our issues by legal evidence; and over and above that, and in addition to the suggestions made by your Honor, Graham was asked the question in a wholesale way, if there was any truth in these charges against him, and if any evidence had ever been produced against him in any court, and here was the evidence offered in court upon an adverse question.

MR. McNAB: I again ask you the question, Mr. Dunne, did you offer the affidavits for the purpose of establishing the truth of the facts to which the affiants swore?

MR. DUNNE: So far forth as any issue raised by you in this case is concerned, yes.

HUGH McLEAN, a witness for complainant, after being sworn, testified as follows on Direct Examination by Mr. McNab:

I am a general contractor. At present I am Postmaster in the City of Marshfield, Oregon. Prior to that I was in the general contracting business, railroad contracting. I have done bridge building. I am fairly familiar with the road bed and right of way of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company and was familiar with it at the time that Mr. Chandler the receiver took it over under certain legal proceedings. At that time I was logging, having trains of logs hauled at frequent intervals. I was over the road 2 or 3 times a week, other times probably once a week. As to the roadbed's condition I had the opportunity to examine it that any one would have by riding over it. I didn't walk over it to examine it nor didn't look at the roadbed with that specific idea in view. The roadbed of the Coos Bay Railway was much the same as it was at all times. It was a small road, about 27 miles in length, that didn't connect up with any other road down there. I think the rails were about 40-pound rails, which is much lighter than the ordinary rails laid on railroads. They had two engines, a couple of coaches and some flat cars and box cars. The roadbed itself was about in the same condition that it had been for a number of years. It was kept in safe repair for railroad traffic. It was not run down, broken down. The bridges and trestles had been built a good many years. Of course they deteriorate with time. Bridges and trestles require constant attention to keep

them up. They were probably in the condition that any other bridges would be that were operated on every day. While under Mr. Graham's management I consider that it was in as good repair as any ordinary railroad of the kind. I have been engaged in coal mining in West Virginia and Oregon. In West Virginia my business part of the time was digging coal for a living—mining it, actually mining it. The other time I was opening up coal mines. I was there about four years. I was more or less actively engaged in the coal mines in Coos County from 1894 until, as near as I can recollect it, 1898. I first became active in the Beaver Hill Coal Mine, about 14 or 15 miles from Marshfield, Coos County, in Oregon—for the Beaver Hill Coal Company. Prior to that I had had experience in running drifts, tunnel and general mining work for about four years. I was at the Beaver Hill Coal Company from December 24, 1894, to some time in May or June, 1896. The latter date I am not positive about. The occasion for leaving there was that the Alaska gold strike was on pretty strong at that time and I was thinking of going to Alaska. I must have left there in 1896. The first superintendent of the mine was a man named Williams that came from West Virginia at the same time I did, who only was superintendent of the mine a short time. The next superintendent was a man named J. L. Parker, I think. He was superintendent at the time I left. I observed their work as superintendents. The mine at the time was worked as well as it was possible to work it during the time that I had any chance to observe it, with one ex-

ception—and that is, the mine in my estimation was mined too hurriedly. The demand at certain times of the year, that is, in the winter months, was so great for coal, that methods were employed that I would not employ to mine coal; without that strain and stress in the mining operations they would have been more skillfully conducted I think. The trouble there was, when the demand was so great to get coal out, we didn't have development enough to get it out as scientifically as it should be. In mining coal you have to have a great deal of ground opened to get any large quantity out; and frequently after rooms were driven up—what we call gangways are driven straight and rooms are turned up at right angles to the gangways. The Beaver Hill vein pitches about 45 degrees. Frequently when they were very short of coal, after driving a room up and leaving a sufficient pillar to hold the weight of the roof, they were ordered to take what miners term a skip off the rib; that is, take 5 or probably 10 feet off that pillar and pull it back with them as they come down. For instance, if a pillar was left 25 feet to support the roof, and the room that was driven up there was 15 or 20, as the case may be—take off a skip or 10 feet, at that time, because the room was already opened up and your chutes were all in and you could get that coal very cheaply and quickly. But unfortunately you weakened your supporting power for your roof. The great demand from the market I presume was the reason for taking the coal out in the manner I have described. I consider there is some peculiarity about the Coos Bay coal that renders it peculiarly susceptible to

fire, or which is likely to develop fire by internal combustion. In the first place, the roof, as we call it, on the Beaver Hill mine and the Beaver Hill coal, or the Beaver Hill vein—it might better be termed the Beaver Hill vein; it runs not only where the Beaver Hill mine is at present, but where the Beaver Hill mine was and is now, and also on over farther to the Coquille River. It also runs north to where the C. A. Smith people, or the people who are operating their properties now are mining. The roof in that country is not very good, it is hard to support. The coal in that country has got what we call a parting in it, consisting of nearly pure sandstone of about 6 inches in thickness. When we mine the coal in that region we mine that out. The bottom bench is usually nearly about 3 feet thick and the next bench is from 3 to 3½ and maybe varies sometimes as much as 4 feet, and then a small bench on top of about a foot. Now, in mining that coal out, we have what we call a gob on one side or the other. In driving up the room a chute is built for the coal to run down, but when they mine out a chute on either rib and the coal comes down, a great deal of matter comes in there that is not coal; it has to be picked by the miners, and that is throwed in the gob. Now, after the coal is removed, we have what we call a bony on the bottom, and frequently a mass of shells which is almost pure bicarbonate of lime, and that after a short time when a room is abandoned, and no air traveling in it, it fires by spontaneous combustion. That is my idea of spontaneous combustion, and the fires in the mines in Coos County. I consider the mining op-

erations could have proceeded more scientifically and with less loss. I consider that the coal could have been mined in the long run more economically and more got out—cheaper. When demands came for quicker shipment of coal was the result of robbing the pillars and taking the support away from the roof brought on what miners call a squeeze; in other words, the whole mine began to creep a little. There wasn't enough support to keep it solid, and the weight came down on it so heavily that it crept a little, and brought a squeeze on the whole mine. I operated what was known as the Klondike mine as superintendent for Mr. R. A. Graham. I didn't rob any pillars. I opened up the Klondike mine along on the room and pillar system, but I left what I considered safe pillars, and we never robbed any pillars to my knowledge. When Mr. Parker and another gentleman were there Mr. Gresham was the manager at that time. He did a little of everything around there. A gentleman came to see Mr. Graham once when I was standing in front of the store, and he asked me if I knew where he was, and I told him he would be down in a few moments. I went into the store, came out, and Mr. Graham was just coming up the steps. We had to come up six steps to the platform that was on the store; and Mr. Graham had on a miner's cap with a lamp sticking in it, and a pair of cowhide boots with tops turned down, all over mud, and a blue jumper, also very muddy, and I told that gentleman that that was Mr. Graham, and he said, "Well, I wasn't born yesterday, young man." He couldn't believe me. But that was some of the things that Mr.

Graham would do. He would go into the mine that way, with a miner's lamp, and go all around in it, and help do anything, very energetic. I didn't see any evidences of extravagances around there. I was there at the offices of the railroad at Marshfield when Mr. Hasset was, I don't know anything about the ousting. Excuse me, do you mean Marshfield or up in the woods? I know the time but have no way of fixing it in my mind. Immediately following this occurrence the Beaver mine was shut down. I do not mean the Beaver Hill Coal Mine. I don't know anything about what was done with the Beaver Hill, I was not there. But I was at the Beaver mine, logging right alongside of it. It was shut down. I think everything was attached around there almost immediately after the taking possession of the railroad, a great deal of it, it strung out every time anybody could find anything to attach, for several days.

O. J. SEELEY, witness for complainant, after being duly sworn, testified as follows on direct examination by Mr. McNab:

I live in Coquille City. I am the O. J. Seeley in whose name the stock in the Coos Bay, Roseburg & Eastern Railroad & Navigation Company has stood for so many years. I was a director. About August 20, 1906, I attended a gathering there in the offices of the railroad company. Judge Coke invited me. He lives in Marshfield. It was after the regular annual meeting. We didn't attend the annual meeting. I wouldn't attend it. Judge Coke came to me and asked

me as a personal favor to meet, and I agreed to, provided there would be no business done. And he said all they would do would be to call the meeting to order and adjourn, which they did. I think at that time there was 999 shares of stock stood in my name. I was holding them for R. A. Graham. I recognized no one else as having any ownership in them. We transacted no business at that meeting whatever. W. S. Chandler and Judge Coke and J. W. Bennett and myself were there. Since that I have attended no other meeting. I attended no meetings at any time when any of the stock standing in my name was transferred to anybody else or any director was appointed or elected in my place nor did I receive any notice of any such meetings. No meeting occurred. I cannot state when I first heard I was no longer a director of the Coos Bay Railroad. I never resigned. It was after August 20, 1906, the date of the annual meeting, that I heard that there was a director in my place. I never resigned as a director at any time. I was a witness in the case known in this record as the salary case brought by Mr. Graham against the Coos Bay, Roseburg & Eastern Railroad & Navigation Company at Coquille to recover alleged salary of \$10,000 a year. I testified in the Baines case too. In the salary case I was called as a witness by Mr. Graham to testify about a resolution that the board of directors had adopted fixing his salary.

Q. (To the witness.) Now, I will read a portion of your testimony in the Baines case, as shown in the record in the salary case: "Q. Mr. Seeley, are you the "O. J. Seeley that served as a director of the Coos Bay,

"Roseburg & Eastern Railroad & Navigation Company?" And you answered, "Yes, sir."

A. Yes.

Q. "Q. From August, 1890, to April, 1894? A. "Yes, sir. Q. You are also the O. J. Seeley who subscribed to the capital stock of that corporation and "subscribed for all the stock with the exception of seven "or eight shares? A. Yes." You so testified, didn't you?

A. Yes, sir. Yes, that is correct.

Q. "Q. You were a director of the corporation, "were you, Mr. Seeley, in April, 1894? A. Yes, sir." That is correct?

A. Yes, sir.

Q. "Q. You continued to be a director until some "time in 1899? A. Yes, sir." That was correct, wasn't it?

A. Yes. I so testified, in that case.

Q. You answered "Yes, sir"? A. I think so. Such were the facts and I answered yes.

Q. That is correct. You were then called as a witness on behalf of the defendant corporation, and being first duly sworn, testified as follows—that was in the Baines case: "Q. Mr. Seeley, you may state what "position you held in the Coos Bay, Roseburg & Eastern Railroad & Navigation Company in 1899." And "you answered, "Well, I was not on the road in 1899. "Q. You were not working on the railroad. What "position did you hold in the company?" And you answered, "I was a director of the company. Q. You "were the O. J. Seeley that subscribed for all of the

“capital stock of the company, with the exception of 7
“or 8 shares?” And you answered, “Yes, sir.” That
is correct, is it?

A. That is correct.

Q. “Q. You voted that stock at the stockholders’
“meeting?” And you answered, “I did.” Then you
were asked this question: “What did you do with the
“stock, then?” And you answered, “It was in the of-
“fice. Q. Office of the company?” And you said,
“I think so.” Then you were asked this question:
“When you got it, you endorsed it over to whom?” And
you answered “I endorsed some over to J. D. Spreckels
“& Brothers Company, ten thousand and one shares.”
You so testified, did you not?

A. Yes, I did.

Q. “Q. When did you endorse that over to J. D.
“Spreckels & Bros. Company?” And you answered, “I
“think in the year 1893, or 1894.” You so testified,
didn’t you?

A. Well, I think I did. I think if it is there, I
must have.

Q. “Q. You are ready to say it was not in 1892?”
You answered, “I would not be certain. I can’t say
“as to that.” You so answered the question, did you?

A. Well, I expect I did. I haven’t any recol-
lection of it, though.

Q. “Q. You know you did endorse 10,001 shares
“of stock over to the Spreckels Bros. Company?” And
you answered, “I was under the impression that I did.”

THE WITNESS: (continuing) Yes, I expect I
so testified. It was the fact that I did endorse the

stock over. I may have testified to that. As a matter of fact, I was acting in everything that I did, as director and as stockholder, in the interests of Mr. R. A. Graham, who owned the stock. I had no interest in it. I was a figurehead.

RE-DIRECT EXAMINATION.

I couldn't say positively when it was I endorsed the 10,001 shares to Messrs. Spreckels Bros. & Co.

PETER MARSDEN, a witness for complainant, after being duly sworn, testified as follows on Direct Examination, by Mr. McNab:

I reside in Portland, Oregon. At the present time I am assistant manager for the Crane Company here, the wholesale hardware people in this city, and have been since about 1904. I have been with them though longer than that. Prior to that I was employed by Mr. Graham at Marshfield, Oregon. When I first went there I wrote Mr. Graham's private letters and he went East after I had been there some two or three months and then some of the bookkeepers resigned or left, or something of that kind, and I was put in the office keeping the books, some of the time doing some letter writing; most of the time though on the books. I recall that two gentlemen, Hamilton and Powers, of San Francisco, representing J. D. Spreckels & Bros. Company coming up to the office of the Coos Bay Railway. I don't know whether they were attorneys or not. I supposed they were from San Francisco. Mr. Powers was only there a few days, a day or two prob-

ably. But Mr. Hamilton was there—oh, he might have been there a couple of weeks. I heard a good deal of discussion relative to these accounts, one, two and three, in the bank and other items. I was familiar with the accounts there, judging from the time when Mr. Hobbs left there, which was in March, 1898, I resigned from Mr. Graham in March, 1899—I should judge about a year I was working on the books. I never saw Mr. Graham himself have anything to do with the books. Mr. Graham was there when I got there first, about November, and he went East about the first of the year, and I didn't see him again until the fall. I saw him in the fall, and at that time, why, he didn't work around the office much; he was up at Beaver Hill—or rather at another mine, they called it the Klondike, I believe. It was close to Beaver Hill mine. He spent most of his time up there. They were building a short railroad or something, up there. During all of the time that I had anything to do with him I never discovered or knew of the slightest irregularity in the books of that concern, no.

(Counsel for plaintiff then offered in evidence the deposition of Mr. J. B. Hassett, as follows:)

DIRECT EXAMINATION.

TO MR. McNAB: My name is J. B. Hassett. I reside in California. I am an accountant; been engaged in that for many years. I was living in Marshfield, Oregon, in the year 1899. I was secretary and treasurer of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company. I first became secre-

tary and treasurer about 1893; their offices were in Marshfield, Oregon, from the time that I became secretary until I left Marshfield. The offices were in the outskirts of the city. The roadbed and terminals of the railway were at the end of the track on the wharf. I was still secretary in December, 1899, of that corporation. Have never resigned or been removed. In December, 1899, Mr. Chandler and the sheriff and a couple of detectives and perhaps a couple of others—there were either six or eight in the party—came to the office and took the office away from me. That is, the office of the secretary and the auditor of the books of the railway. I am referring to Mr. W. S. Chandler. William Gage was the Sheriff of Coos County, Oregon, then. I knew the other men by sight who accompanied them. They had been there for perhaps a couple of weeks. They didn't expose any arms, I don't know that they were armed. When I was inside of the counter and Mr. Chandler and the other men came to the outside of the public counter and Mr. Chandler made a demand on me for the possession of the office and the railroad and everything connected with it, and I refused to surrender it and told him it would be necessary for him to use force to get in, and we discussed the matter for probably 5 minutes, may be 10, and there was a doorway—flap—on the end of the counter for passage in between, and that was down. As a matter of fact it was up when they were coming and I put it down—I knew they were coming in—and Mr. Chandler pushed his way in through that and took charge. I saw them for 10 minutes before they came there, coming down

the wharf. I don't recall who was in the office with me. There were other people there. I recall that part of it, and I suppose it would be the regular office force, but I don't remember any particular person in the office at the time. From the time Mr. Chandler came through the door and took charge as I have described, I was not allowed to have anything further to do with the books or equipment there. I had access to that office, to the floor, the stove and the chairs, for probably 10 days after that. There were papers of Mr. Graham's there, individual, personal papers, and I think that was the reason for permitting me to come there, but even then I did not do anything with them. They did nothing with regard to allowing me to handle the books or papers of the railway company. I didn't do anything with them; I wasn't permitted to handle them after that. I know that the safe was locked and the safe was later opened, and I didn't open it, and I was the only one with the combination—wait a moment, there were others with the combination, but no one had an inside key. I don't know whether or not after this incident I have related the combination was changed or not. I never touched the safe. I know I locked the safe and didn't unlock it, and I was in charge of the safe and the safe was open later on. After the entry by Mr. Chandler and the sheriff, William Gage, I was never after that permitted to have anything to do or say concerning the affairs of the corporation in the office or its books. The Sheriff served upon me no papers or exhibited to me any warrant or legal paper of any kind. I don't think anybody offered anything

except Mr. Chandler himself, but I did perhaps address a question to Mr. Gage or make a statement to him or a remark and got an answer to it, but it was merely incidental. Mr. Chandler was in charge. The Sheriff made no demand upon me whatever. I don't think he came through the railing and flap door that I have described. I recall him only on the outside of the counter. The two men stood outside during this episode until Mr. Chandler came in, and I think both of them immediately followed him inside the railing; I don't know what moment but they were there immediately afterwards.

CROSS-EXAMINATION.

I did not try to retake possession at any time of the properties. I telegraphed Mr. Graham the particulars of what had happened during the day. I don't know, however, that he got the telegram. The next time I saw him I discussed the matter but that was a long time afterwards—a month afterwards. I don't recall what Mr. Graham said.

W. S. CHANDLER, a witness for complainant, after being duly sworn, testified as follows on Direct Examination, by Mr. McNab:

I reside at Marshfield. I never was receiver of the Beaver Hill Coal Company. I was for the Coos Bay Railway. I was at one time manager of the Beaver Hill Coal Company, for J. D. Spreckels & Bros. Company. I took possession of the office, equipment, books and other affairs of the Coos Bay Railroad at

Marshfield December 18, 1899. I went there to take possession of the books I suppose as agent. I was not then receiver. I was not an officer of the law. J. D. Spreckels & Bros. Company sent me there. They instructed me to take possession. I couldn't repeat what they told me. Judge John S. Coke, Dr. Everett Minigus, Mr. Gage, the Sheriff, and two detectives went with me. I don't recall the purpose I requested Judge Coke to go. I don't think he was the legal representative of the Spreckels at that time. I think I asked the Sheriff to go. He had no warrant that I know of for the arrest of anybody. He went along to see, I suppose, that there was no trouble between us. I could say he was armed. The detectives came from Portland. Field's detectives. They had been quite a little while around Marshfield prior to our going down to take charge of the office. They were in Spreckels' service. They were not armed. I never saw any arms. I couldn't say when those men came to Marshfield. I suppose I got into communication with them as soon as they came there. I can't recall how long it was before we went down to seize the railroad. I had those men watching movements around the railroad people and around the railroad track. They were watching offices to see that there wasn't anything taken away. Don't think Mr. Graham was there. I believe he was in the East. Whether the detectives were down on the wharf where the office is I don't know but they were watching the premises, just guarding the premises. I sent for them to come to Marshfield from Portland. I paid the bills. I don't recall how much they got. I

was not with them all the time they were there. I couldn't say if that was going to be a sweet, peaceable, law-abiding meeting, I couldn't tell how that might turn out when I got over there. I didn't think there would be any trouble to speak of. I wasn't alarmed about having a sufficient force. I don't think I had any arms. I did testify before in this matter. I said some one had arms but I didn't have any myself. Nobody got shot. There was no shooting around there that evening or afterwards. I went down and went into the office. Dr. Everett Mingus accompanied me. He is a physician of Marshfield. He was at that time connected with the Beaver Hill Coal Company as their surgeon. He happened to be in town, and we went out together. I believe I requested him to go just for company, just to go out and take possession. I don't know how long it took us to make the trip from Marshfield down to the office. I did not take the two detectives along just for company. I was going to put them in possession, leave the premises in their possession afterwards. The Sheriff was taken just for company. I just told him that we were going down to take possession of the road, that is all. The only suggestion by me that the Sheriff might be necessary there was simply to see that there might not be any trouble, although I didn't anticipate any.

We simply went in there. I spoke to Mr. Hassett; he has given you the whole statement. His statement that he told me that we could not have possession is correct. He didn't say anything about using force. Dr. Mingus and the two detectives went with me. We

simply took possession, that is all; told Mr. Hassett we came down to take possession. I asked him first off if he would give peaceful possession of the road and he said no, so I went in. I did nothing with the safe. Mr. Hassett locked it. One of his clerks there, a man by the name of Bingham, came to me that evening and said that he wanted to remain in the employ and he says, "If you will give me the job I will go down and open the safe." I certainly gave him the job. All the books and papers of the company were kept right there. I had no letters with me from J. D. Spreckels giving me any instructions, when I went up there. I went down there on December 18, 1899. I couldn't say exactly when I got the instructions from Spreckels to go over and seize the property, but we had been wiring from Marshfield to San Francisco, exchanging wires. I went down there on December 18th. I suppose the detectives had been there by the 4th of December. I didn't go there on the 4th of December; I was there already. I didn't have any instructions at that time excepting to watch the property to see that there was nothing carried away. I received instructions to go down and seize it on the 18th of the month by wire from J. D. Spreckels & Bros. Company. I never saw the detectives armed. I never saw them with any firearms. They may have been armed but I never saw them.

ERNEST H. HOBBS, a witness for complainant, after being duly sworn, testified as follows on Direct Examination by Mr. McNab:

I reside in Portland. I am cashier for Crane & Company, wholesale plumbers and iron people of this

city. I have been with them 18 years. Prior to that I had been at Marshfield, Oregon. I went there first in November, 1897, in the employ of the Coos Bay, Roseburg & Eastern Railroad. I was bookkeeper. Mr. Hassett was the man in general charge of the books and accounts of the company. Mr. Graham had nothing to do with the keeping of the books. During the time I was there I was familiar with the records and books and transactions that went through the office. To my knowledge during the time I was there, no irregularity of any kind was known to me concerning those books or the affairs of the company.

(Counsel for plaintiff offered in evidence Certificate No. 8 for 4,995 shares of Beaver Hill Coal Company, together with the stub of the certificate book, as follows:)

“STUB.

Issued for No.....
 No. of Certificate..... 8
 No. of Shares.....4995
 By whom
 To whom—The Bank of California, Trustee.
 Date—June 8, 1899.

Received the above Certificate subject to the Articles of Incorporation and By-Laws of the Company.

S. B. SMITH, A. Chr.

Date of Cancellation—Mar. 3, 1904.

Cancelled by issue of No. 14.”

FACE OF CERTIFICATE.

“Capital Stock \$500,000

No. 8

4995 shares

5000 shares—\$100 each.

San Francisco, June 8, 1899.

BEAVER HILL COAL COMPANY.

This Certifies that The Bank of California, Trustee, is entitled to Forty-nine hundred & ninety-five shares of the BEAVER HILL COAL COMPANY, transferable on the books of the company by endorsement hereon and surrender of this Certificate.

A. B. SPRECKELS, President.

FREDK. S. SAMUELS, Secretary.

(Seal) Stock Certificate.

(Endorsement on back of certificate.)

“Transfer to J. D. Spreckels & Bros. Co.

The Bank of California,

A. B. Smith, A. Chr.

J. D. Spreckels & Bros. Company

A. B. Spreckels, Vice-President.”

MR. McNAB: Date March 3, 1904, on the stub and Certificate No. 14, issued for No. 8 for 4995 shares, from the Bank of California, Trustee, to J. D. Spreckels & Bros. Company, date March 3, 1904.

The record which I specifically wished to direct attention to was: “From the Bank of California, Trus-

tee, to J. D. Spreckels & Bros. Co. Date March 3,
1904.

STUB.

Issued for No. 8.

No. of Certificate 14.

No. of Shares—4995.

By whom—The Bank of California, Tr.

To whom—J. D. Spreckels & Bros. Co.

Date Mar. 3, 1904.

Received the above Certificate subject to the Articles of Incorporation and By-Laws of the Company.

J. D. SPRECKELS & BROS. CO.

W. D. K. Gibson, Treasurer.

Date of Cancellation.....18...

Cancelled by issue of No.....

Face of Certificate.

“Capital stock \$500,000

No. 14

4995 shares

5000 shares—\$100 each

San Francisco, March 3, 1904.

BEAVER HILL COAL COMPANY.

This CERTIFIES that J. D. Spreckels & Bros. Co. is entitled to forty-nine hundred and ninety-five shares of

THE BEAVER HILL COAL COMPANY

Transferable on the books of the Company by endorsement hereon and surrender of this Certificate.

A. B. SPRECKELS, President.

FRED'K S. SAMUELS, Secretary.

(SEAL)

(Endorsed in red ink on face) Cancelled March 16, 1907.

(Endorsed on back) J. D. Spreckels & Bros. Co.
A. B. Spreckels, Vice-President."

(An adjournment was here taken until tomorrow, Friday, April 21, 1916, at 10 A. M.)

FRIDAY, APRIL 21, 1916—10 A. M.

W. S. CHANDLER

DIRECT EXAMINATION (resumed).

I was not armed when I went there. The others were not armed that I know of. If they had rifles I would have known it. I didn't see any, neither did I see pistols. I testified in the action brought by R. A. Graham against the Coos Bay Railroad with regard to salary at Marshfield.

Q. I will ask you whether, on that occasion you testified as follows: "Re-cross-examination by Mr. Watson (page 308) 'Q. You knew that they claimed

to be the legal directors, didn't you? A. No, not that I know of. Q. When you went there you say you took peaceable possession? A. I asked for peaceable possession." You so testified, did you?

A. Yes, sir.

Q. "Q. When you went there, you and your men were armed, were they not? A. Yes, sir." Did you so testify?

A. I might. Read along a little bit further, and you will find that we were armed, that is, in the evening, we were armed. Not at the time we went in. That is what I say.

Q. I am asking you first, if you testified to this. You will have any opportunity you wish to explain.

A. All right.

Q. "Q. When you went there, you say that you took peaceable possession? A. I asked for peaceable possession." Did you so testify? A. Yes, sir.

Q. "Q. When you went there you and your men were armed, were they not? A. Yes, sir." Did you so testify?

A. I may have testified that way.

Q. "Q. With rifles? A. Yes, sir. And they were armed on the inside also." Did you so testify?

A. Yes, sir.

Q. I beg pardon? A. I believe I did there.

Q. "Q. Who was armed on the inside? A. Laize had a gun, and I believe that Bingham had a "gun." Did you so testify?

A. Yes, sir.

Q. "Q. They were the men in the office? A.

"Yes, sir." You so testified? A. Read along a little further.

Q. Next question. "Q. You went there armed, "expecting that there might be some trouble? A. No, "I didn't anticipate any trouble." Is that your testimony.

A. I think so. Read along a little further.

Q. Yes. I will read along, right along. "Q. "No shots were fired? A. No, sir. Q. What position did Laize occupy in the office? A. He was one "of the clerks there. I don't know just at that time "what act he was doing. Q. Did you see Laize with "a gun in his hand? A. No, sir. Q. Where was "the gun? A. He had it in the office. He showed "it to me. Q. At that time? A. No, afterwards, a "day or two afterwards, he had it laying in his desk. "Q. He didn't show it to you at that time? A. No. "Q. Who else had a gun? A. Bingham. Q. Did "you see his gun at that time? A. No, sir, not at the "time we entered, no. Q. Where was it? A. In "the office there. Q. He did not have hold of it? A. "No, sir. Q. He didn't make any attempt to get it? "A. No, sir. Q. Weren't your relations with Mr. "Laize at that time, and ever since friendly? A. At "that time I don't believe I scarcely knew Mr. Laize. "I had only seen the man once or twice at the time that "I went to the office."

A. Well, now, I would like to explain that. When we went out there, as I stated yesterday, we were not armed; and it was in the evening. After I had taken possession, within about half an hour probably, after

I had taken possession, I went back to town, and I got some men there to guard the property, and those were the men that were armed. They were there for night watchmen to guard the premises.

Q. You now testify, do you, that it was not when you went there to take possession that you had guns with you at all, do you? A. I didn't have; absolutely didn't have any.

Q. And that none of these other men had any guns? Then with that explanation in view, I again ask you whether you testified as follows: "Q. When 'you went there, you say that you took peaceable possession? A. I asked for peaceable possession. Q. 'When you went there you and your men were armed, 'were they not? A. Yes, sir."

A. Well, I didn't mean it that way, when we took possession. Of course they were armed in the evening to protect the property. That was the idea.

Q. Protect the property against what?

A. Well, I suppose there was some feeling in the community at the time, and the men hadn't been paid for months and months, and wanted to understand everything about these changes, and I wanted that property guarded, that there was not any further books or accounts taken from the office, and possible danger of setting the place afire; and for that reason I went to town, as I said, and got these men to guard as watchmen during the night.

(Counsel for the plaintiff reads the following portion of the cross-examination into evidence:) (Page 308.) "In the Circuit Court of the State of Oregon.

“R. A. Graham v. The Coos Bay, Roseburg and Eastern Railroad & Navigation Company:

“Q. When you went there, you say that you took “peaceable possession? A. I asked for peaceable possession. Q. When you went there, you and your “men were armed, were they not? A. Yes, sir. Q. “With rifles? A. Yes, sir, and they were armed on “the inside also. Q. Who were armed on the inside? “A. Laize had a gun, and I believe that Bingham had “a gun. Q. They were in the office? A. Yes, sir.”

THE WITNESS: (continuing) I would like to say this: your own Mr. Hassett testified in his deposition that he didn't see any rifles or any guns, and that is correct. When I took possession I should say it was about between 1 and 2 in the afternoon. I retained possession from then. The only one who left the office was Mr. Hassett about the following half hour. I left somewhere about that time myself. I went alone. I left Laize and Bingham behind me. Also a man named Fields and two detectives. The office was closed about 6 o'clock. It was not locked up for the day. I had as I say these three men that I sent out from town, I can not recall their names, a man by the name of Albright. I don't mean the two detectives I had taken there from Portland. They remained there until towards evening. They didn't go down in the evening with me. They went down when I went to take possession. They had no rifles. Laize and Bingham were not there in the evening. I cannot recall whether they were there or not when I went down to open up again in the evening. They probably stayed there until

their day's work was done. I just went back in the evening to give the men instructions what to do. This was about closing up time. I cannot recollect whether Laize and Bingham had gone for the day or not. I didn't say I went back with rifles in the evening. These men went down there. I don't know whether the rifles were in the office or whether they took the rifles with them. I couldn't say as to that. I meant by saying that "When I went there, my men and I were armed, with rifles and armed on the inside also," that Laize and Bingham were there all the afternoon, finishing their day's work as I told you before. I cannot say whether they were in the office when I went back in the evening, or not. I suppose they finished their day's work.

(Counsel for plaintiff offers in evidence a certified copy of the deed made on the 8th day of June, 1899, to the Marshfield property.)

(NOTE: The above offer of "Complainant's Exhibit 43" is not copied into this Statement of Evidence, but is made a part of the record hereof; and may be found in the papers accompanying the same.)

(Counsel for plaintiff also offers in evidence the deed from the Bank of California to J. D. Spreckels & Brothers Company, made pursuant to a resolution dated July 2, 1907, the deed itself executed on the 2d day of July, 1907.)

(NOTE: The above offer of "Complainant's Exhibit 44" is not copied into this Statement of Evidence, but is made a part of the record hereof and may be found in the papers accompanying the same.)

(Counsel for the plaintiff for the purpose of showing irregularity in the transfer of the stock of the Coos Bay, Roseburg & Eastern Railroad and Navigation Company from stockholder to stockholder, and eventually from the railroad to the Southern Pacific, and for other purposes, offers in evidence, first the minutes of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, commencing on page 137, and pages following.)

MR. HOHFELD: There had previously been a resolution changing the principal place of business from Roseburg to Marshfield.

MR. HAMPSON: At pages 40, 41 and 42 of the original Record Book, proper resolutions adopted by the Board of Directors and by the stockholders provided for a change of the place of business of the company from Roseburg to Marshfield.

MR. McNAB: That is admitted. The admission is that a resolution of the company was passed the 20th of February, 1891.

MR. McNAB: Is there anything in the books, gentlemen, showing, prior to the meeting in San Francisco, any legal resolution by which the offices at Marshfield were abandoned, and they were transferred to the Flood Building at San Francisco?

MR. HAMPSON: I guess there is. There is a provision for the holding of the meetings of the Board of Directors at San Francisco. If you will give me the book, I will find it.

MR. McNAB: Consent of the individual directors for holding such a meeting. Of course, our contention would be that even if so passed, it was illegal.

W. S. CHANDLER, being recalled for the complainant, testified as follows on Direct Examination by Mr. McNab:

I became Receiver of the Coos Bay, Roseburg & Eastern Railroad and Navigation Company the first time on January 8, 1900. That was in the action brought by J. D. Spreckels & Bros. Company for the appointment of a Receiver of that railroad. I was not a stockholder until May 1st, 1900, I think. At that time there was not any change in my relationship, only I was appointed Receiver again, May 1, 1900. I was appointed Receiver first at the instance of J. D. Spreckels & Bros. Company, January 8, 1900, and my relations as Receiver ceased under that action May 1, 1900. I became Receiver under the suit brought by the Farmers Loan & Trust Company at the same time that I terminated my relations as Receiver in the first suit. At the time I was appointed Receiver in the second suit brought by the Farmers Loan & Trust Company, the records would show whether I had been discharged as Receiver in the first suit brought by J. D. Spreckels & Bros. Company. I think it was July 1, 1907, I ceased to be Receiver in the second suit. I could not say when I became a stockholder in the Coos Bay, Roseburg & Eastern Railroad & Navigation Company. I presume I became a stockholder while I was Receiver. I think it was September 4, 1906, at the time I became

the record owner of 19,970 shares; at the instance of the railroad company. I did not pay for that stock. It belonged to the Southern Pacific Company. I received \$200 a month as Receiver in the first receivership suit and the same salary under the second suit. I was discharged as Receiver July 1, 1907. I don't think my relationship with the railroad continued after that. I first represented J. D. Spreckels & Bros. Company when I first went up there to interest myself in the affairs of the Coos Bay Railway. Prior to the time that the sale was made to the Southern Pacific I still continued as Receiver for about a year.

I took no part in the negotiations carrying forward the transfer by the Coos Bay, Roseburg & Eastern Railroad & Navigation Company to the Southern Pacific. I was not interested in it. I did receive something out of it in the way of a commission. I don't know whether it was an infinitesimal amount or a substantial commission. It depends. I did not divide that commission with anyone connected with the J. D. Spreckels & Bros. Company. I didn't have anything to do with it at all. I didn't receive the commission from any firm. I received it from an outside party entirely.

MR. McNAB: I yesterday offered in evidence the stub books, certificate book of the Beaver Hill Coal Company for the purpose of showing the stock of that company was never transferred by the Bank of California as trustee until March 3, 1904, and I likewise wish to introduce in evidence and read this entry in

the stock and transfer book of the Beaver Hill Coal Company:

"Name 1904, March 3.

The Bank of California. Ledger folio 28.

Number Certificate surrendered—8.

Number of shares transferred—4995.

Favor: J. D. Spreckels & Brothers Company.

Ledger folio 24.

Number of certificate issued, 14.

Total number of shares, 4995."

MR. HAMPSON: Mr. McNab, in connection with your excerpts from the second Minute book, I call your attention to directors' meeting of April 16, 1898, in which resolution was adopted shown on page 94 of the record of the larger book, whereby it was provided that an office for the company be located at 1043 James Flood Building and that article four of the by-laws be amended by adding the following paragraph: "Regular meetings of the board of directors shall be held the second Monday of each month at 12 o'clock noon at the office of the company in San Francisco, and four or more directors to constitute a quorum for the transaction of business. Special meetings of the board may at any time be called by the president or vice president or any two members of the board, to convene at such time and place as may be appointed." And it appears in the minutes of this meeting that this resolution was adopted under a provision of the Oregon laws permitting directors to hold meetings outside of the state and permitting a domestic corporation to have

a place of business outside of the state and not the exclusion of a place of business within the state and the holding of directors' meetings within the state.

WILLIAM HOOD, a witness called on behalf of the complainant, after being duly sworn, testified as follows on

DIRECT EXAMINATION.

I am chief engineer of the Southern Pacific Company; I was elected a member of the board of directors of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company. I have been in the courtroom and heard read the minutes of an adjourned meeting of the stockholders at Marshfield, at which certain stock held by me was represented. I was not present at that meeting. I don't think W. F. Herrin was present.

(Witness excused.)

COMPLAINANT RESTS.

(Counsel for defendants offered in evidence deposition of ISAAC FROHMAN, whose testimony is as follows:)

(By MR. HOHFELD:)

By name is Isaac Frohman; 47 years of age; residence, San Francisco. I am an attorney-at-law.

MR. McNAB: On behalf of the plaintiff at this time I desire to offer a preliminary objection to the witness testifying on the ground that the testimony may involve a statement of confidential relations and privileged communications as between attorney and client, and, while this may not be involved in the preliminary questions asked, I do not want it to be considered that by failing to object to the preliminary questions I will be waiving the right to object to any questions which might involve the question of privilege.

THE WITNESS (Continuing): In the year 1899 I was associated in the practice of the law with the firm of Garber & Garber. I recall in 1899, there was a case pending in the Superior Court of the City and County of San Francisco, State of California, entitled: J. D. Spreckels & Bros. Company versus R. A. Graham. In the case alluded to I was associated as one of the attorneys for the defendant, Graham, and my information relative to this, and the facts involved in the case were secured in part at least from the defendant Graham; as the cases proceeded I counseled with him relative to the facts and the law. My knowledge of the facts and the application of the facts and the surrounding circumstances were derived, at least in part, from my conferences with him, as his attorney.

MR. McNAB: I object at this time to the witness answering the question in view of the fact that the testimony develops that it would involve a confidential communication between attorney and client, and

particularly I object under section 1881 of the Code of Civil Procedure of the State of California.

THE WITNESS (Continuing): Confining my answer to my recollection of the contents of the complaint, I will state that the action was based upon a promissory note alleged to have been made by R. A. Graham to J. D. Spreckels & Bros. Company, and upon an alleged pledge of certain stocks, bonds, and securities as collateral security for the payment of the note, the object of the action being to recover judgment upon the promissory note and for a foreclosure of the pledge. The attorneys were Edgar F. Preston and I believe a W. L. Pierce. Mr. Preston I believe is dead. I believe the attorneys appearing of record for Mr. Graham were originally Garber & Garber, with A. A. Moore and myself as associates. I participated in the management of the case for the defendant in behalf of the firm of Garber & Garber; and in that connection with the preparation of the defense I had conferences with Mr. Graham as to the facts of the case, and more particularly as to the facts constituting Mr. Graham's defense in the case. According to my recollection the case proceeded to judgment in the Superior Court of the City and County of San Francisco. My recollection is that the case went to trial, and was on trial for about 28 or 30 days. The trial was then suspended. A compromise of the case was effected. As far as I can recall the paper which you have handed to me, and which I hold in my hands is a copy of a form of judgment drawn up and approved—drawn up I believe by E. F. Preston, and approved by the attorneys

for R. A. Graham. When you ask if it was approved by me individually I would say that while there is nothing on the face of the paper to show that I individually approved it, I would say that I believe I approved it, because the handling of these papers was practically left to me. Whether this document was filed and entered, I could not say. I cannot say who filed it.

MR. HOHFELD: I offer in evidence this stipulation, and ask that it be marked Defendant J. D. Spreckels & Bros. Company Exhibit No. 1, with an understanding that a copy will be substituted and that this copy of the judgment will be marked Exhibit No. 2. In the negotiations leading to the drawing up of whatever papers were drawn up and signed in the case, I was the one that, according to my present recollection, met with Mr. Preston for the purpose of hearing what he had to say, and of conveying to him what Mr. Graham was willing to do. It is now about 17 years since these conversations were had, and I could not attempt to detail the conversations. I notice that on the writing dated June 8, 1899, between R. A. Graham and J. D. Spreckels & Bros. Company the signature of R. A. Graham. I believe Mr. Graham signed that himself in my presence. The words "Witness to signature of R. A. Graham, Isaac Frohman" are in my handwriting. The backer on the document came from the law office of Garber & Garber. I saw Mr. E. F. Preston sign the agreement I hold in my hand.

MR. HOHFELD: I offer this agreement in evidence; I will substitute a copy, and ask that it be

marked Defendant's Exhibit No. 3. My impression is that it was in the office of Mr. Preston that the signatures were attached to that agreement. There is a possibility that it was signed at the Bank of California. This is one of the documents which were executed at the time that I have referred to at the ending or after the ending, of the court proceedings in the case *J. D. Spreckels & Bros. Company* against *H. A. Graham*. The circumstances leading up to the execution of the agreement were that when the case was on trial about twenty-eight or thirty days, the trial was suspended, negotiations were opened between *R. A. Graham* and *J. D. Spreckels & Bros. Company* mainly by *E. F. Preston*, and those on behalf of *R. A. Graham* being conducted mainly by me. As a result the agreement of June 8th, 1899, was entered into and executed. I certainly had more than one conversation with Mr. Preston relating to or looking forward to the execution of this agreement. I had several such conversations, I suppose. I met with the experience that an attorney usually meets with when he is negotiating with the attorney of his adversary, as to matters pertaining to the disposition of pending litigation and controversies. The agreement in question dated June 8, 1899, is the expression in terms of the result of those negotiations. In addition to the suit of *J. D. Spreckels & Bros. Company* vs. *R. A. Graham*, there was then pending between these two parties various controversies. Mr. Preston stated that if the pending suit of *J. D. Spreckels & Bros. Company* against *R. A. Graham*, was to be settled, he wanted to have settled all matters in con-

troversy between the parties, and certain corporations in which they were interested. I believe one was called the Beaver Hill Coal Company or the Beaver Coal Company, and the other the Coos Bay, Roseburg & Eastern Railroad Company. You have handed to me three papers which were the outcome of the negotiations that I have referred to. I think there were a number of others which were ultimately drawn up and made with the approval of the attorneys for both sides, I mean by that, E. F. Preston, W. L. Pierce on the one side and the attorneys representing R. A. Graham on the other, and I must modestly say when I speak of the attorneys representing R. A. Graham, that I had the brunt of the work of the drawing of the papers and the negotiations to bear. I cannot sum up in a sentence or a page all that I said to Mr. Preston. There were numerous conversations, and they all had to do with the phraseology of the agreements, and they had to do with the objects set forth in the agreements and other documents involved. The matter of statements that may have been made to me or that I may have made to Mr. Preston do not remain in my memory. To the best of my recollection I said to Mr. Preston that he should draw up such papers as he would require to be executed, and that I would go over them with Mr. Graham. I believe that that is the turn the thing took, that he first drafted the papers he wanted executed. I should say that this agreement may have had that general form when first presented. The agreement is the outcome of those discussions. I looked over the agreement. I do not recall any reservation in my mind as

to whether the language of that agreement meant something different from what it purports to speak. I can recall no reservation in my mind on that subject. I do not think Mr. Graham would have signed it if I had told him not to. So I should assume that I told him and that I advised him to sign it.

“MR. HOHFELD: I call your attention to the allegation of Mr. R. A. Graham in the amended complaint in the action in which this deposition is being taken, as follows: (Reading) ‘Said agreement set forth in Exhibit A was entered into by plaintiff for the purpose of enabling him to secure time within which to settle his obligations at a fixed time in the future, and of securing to him an opportunity to settle his obligations in the future, and plaintiff was advised by his counsel, who was an attorney at law, that in making said agreement a failure on his part to comply with the provisions requiring the payment of \$550,000 would not forfeit plaintiff’s title to the various stocks, bonds, securities, and deeds to other properties therein mentioned, but that said properties theretofore conveyed to defendant as security would merely be held as continuing security and that defendant J. D. Spreckels & Bros. Company could not under any state of facts claim under any breach of said agreement to be the owners of any of said property or securities, and plaintiff verily believed said advice at the time of signing said instrument and at all times thereafter.’ I ask you, Mr. Frohman, whether at the time that that agreement was entered into you advised Mr. Graham that in the making of said agreement a failure on his part to comply with

the provisions requiring the payment of \$550,000 would not forfeit plaintiff's title to the various stocks, bonds and so forth?

MR. McNAB: To which we object on the ground that it assumes that Mr. Frohman is the attorney who gave such advice when, as a matter of fact, whether Mr. Frohman gave such advice or not, the advice referred to was given by an attorney other than Mr. Frohman, but connected with the firm, being the senior member of the firm; on the further ground that it involves a confidential communication distinctly within the provisions of subdivision two of section 1881 of the Code of Civil Procedure of the State of California, and in order to refresh our memories, I will read that section as follows: 'An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment.' There cannot be any question about that, can there Mr. Hohfeld?

MR. HOHFELD: I would like to say, Mr. Frohman—this is a little out of the ordinary, but this deposition is a little out of the ordinary—that I understand the law to be—

MR. McNAB: Just a minute. Are you asking a question or delivering a speech now.

MR. HOHFELD (Continuing)—that where the plaintiff alleges in the complaint the substance of advice by counsel, that to that extent, if there be any privilege, he thereby waives it, and of course, Mr. Frohman, you

are an expert in the law equally with Mr. McNab and ourselves, but I wish to make that statement, that I believe you are perfectly within your rights in answering that question.

MR. McNAB: The allegation of the complaint is based upon certain advice from John Garber.

MR. HOHFELD: The complaint does not so state.

MR. McNAB: I don't care whether it states it or not. I merely place you, Mr. Frohman, on the language of section 1881 of the Code of Civil Procedure, which I know you will observe does call upon counsel not to disclose advice he gives to his client.

MR. HOHFELD: I am not asking that. I am asking whether or not he, as attorney, gave that advice. That can be answered by 'yes' or 'no.'

MR. McNAB: Yes, and if he says that he did or did not, you are involving Mr. Frohman in a distinct violation of subdivision 2 of section 1881.

MR. HOHFELD: The question can be answered by 'yes' or 'no.' If we followed it up—

MR. McNAB: That will be an attempt to circumvent the plain meaning of the law, which Mr. Frohman will not assist you in.

MR. HOHFELD: I will take Mr. Frohman's answer if he will give it. First, read the question, Mr. Reporter.

(The reporter reads the question.)

MR. McNAB: I object to the question on the re-reading on the further ground: That it is an attempt, after 17 years, to ask an attorney to construe or to change by parol testimony, or alter and amend the language of a written instrument, and, in addition to that, that it involves a violation of confidential communications within the distinct provisions of this statute. Now, it is up to you, Mr. Frohman.

A. Please read the concluding portion of the question.

(The Reporter reads as follows: 'I ask you, Mr. Frohman, whether at the time that that agreement was entered into you advised Mr. Graham that in the making of said agreement a failure on his part to comply with the provisions requiring the payment of \$550,000 would not forfeit plaintiff's title to the various stocks, bonds and so forth?')

MR. HOHFELD: I am going to change this question.

MR. McNAB: This is an extremely important question; not only of policy but of law, and I think we had better get it right now.

MR. HOHFELD: Don't be intimidated by Mr. McNab, Mr. Frohman.

MR. McNAB: Mr. Frohman does not need me to intimidate him.

MR. HOHFELD: I thought to add a little humor to it.

MR. McNAB: It is not a matter for humor. It is a matter involving \$1,300,000 at least, and I think Mr. Frohman is not going to put his word, after 17 years, to favor anybody's interests even yours or mine.

MR. HOHFELD: I will change that last question.

MR. McNAB: Plaintiff has not had an opportunity in a court of justice ever to state his side of this case, but he will in a few days.

MR. HOHFELD: Q. Did you advise Mr. Graham that in the making of said agreement that J. D. Spreckels & Bros. Company could not under any state of facts claim under any breach of said agreement to be the owners of any of said property or securities? I will stipulate to the same objection that Mr. McNab has heretofore made, that they may stand as his objections to this question.

THE WITNESS: I want that question read again.

(The reporter reads the question.)

A. In view of the objections just raised by Mr. Graham's counsel, I must decline to answer you respecting any advice that I gave R. A. Graham.

MR. HOHFELD: The Notary will ask the witness the question.

THE NOTARY: Q. Did you advise Mr. Graham that in the making of said agreement that J. D.

Spreckels & Bros. Company could not under any state of facts claim under any breach of said agreement to be the owners of any of said property or securities?

Q. Do you decline to answer the question?

A. Yes, objection being made, or rather, no consent being given that I shall answer any question as to any advice I gave R. A. Graham, based upon any communication made by him to me.

MR. HOHFELD: Q. Is your memory, Mr. Frohman, sufficiently refreshed on that as to be able to state whether or not you did give him advice on that subject or did not give him advice on that subject? A. Is objection raised to that question?

MR. McNAB: Never having had personally an opportunity to even interview the witness, on account of his engagements in court, and knowing absolutely nothing concerning his knowledge, and owing to the great lapse of time, I object on the ground that it comes within the provision regarding confidential relationship, particularly in view of the fact that counsel alluded to in that complaint was not Mr. Frohman.

MR. HOHFELD: Q. You think, Mr. Frohman, that calls for a confidential communication, when I ask you about your memory? A. I understand your question put to me asks me to answer as to advice given by me to Mr. Graham.

Q. I asked you whether or not you remember whether or not you did give such advice. I am not asking what advice it was, Mr. Frohman. I am asking you simply whether or not you remember whether you

did or did not give such advice so that, if, by any possibility the court may rule that it would not be a violation of the confidential privilege, that he could see that it would not be a vain thing to send this deposition back to you to answer. A. In view of that explanation of Mr. Hohfeld's purpose, Mr. McNab, is there any objection, or do you still object to my answering?

MR. McNAB: Mr. Frohman, I have no more idea of what is in your mind than I have as to the movement of the sands of Sahara Desert. I have never had an opportunity to discuss it with you, through no fault of yours, but due to engagements of both of us, and I cannot, without having had an interview with you concerning these complicated matters, offer you advice concerning that question, nor is it my purpose to advise you, but I was advised, perhaps without your authority, that you assumed the attitude after these long years and the dimness of recollection, that it was not safe for you to testify concerning matters which you do not distinctly recall and which involve confidential communication. I may have been incorrectly advised.

MR. HOHFELD: Just put down, Mr. Reporter, before Mr. McNab made this last objection, that he consulted with his client, Mr. R. A. Graham, and then went on with the objection.

MR. McNAB: Just a minute: You are not required by law or anything else to make a moving scenario on your notes of anything that takes place any more than you might be required to allude to the fact that Mr. Hohfeld is twirling his fingers, or Mr. Froh-

man is smoking his cigar. I have a right to consult my client, and I would be an ingrate to him if I did not.

MR. HOHFELD: Q. Now, Mr. Frohman, will you answer the question, or decline? A. I think, in view of the fact that you asked me as to what advice I did or did not give to Mr. Graham, and in view of the fact that Mr. McNab, representing Mr. Graham, objects to my answering such question, that I shall have to decline.

MR. HOHFELD: Will the Notary ask the question?

THE NOTARY: Q. Is your memory, Mr. Frohman, sufficiently refreshed on that as to be able to state whether or not you did give him advice on that subject or did not give him advice on that subject?

Q. Do you decline to answer the question?

A. Yes.

Q. To your knowledge, Mr. Frohman, did any other attorney belonging to the office of Garber & Garber give Mr. Graham the advice which he alleges in his complaint to have been given to him?

MR. McNAB: To which I object on the ground that the advice given by any other counsel to the knowledge of this witness, counsel being associated in the confidential relationship of a partnership, would be the revealing of advice given in a confidential relationship, as much as given by the witness; on the ground that it would be hearsay and incompetent, irrevelant—not immaterial but incompetent.

MR. HOHFELD: Q. What is your answer, Mr. Frohman?

A. I have no personal knowledge or recollection of any conversations on that subject—of any conversation on it which took place between Mr. Graham and any other person associated or connected with the firm of Garber & Garber.

Q. Did Mr. Graham state to you at or about the time of the execution of that agreement that he had been advised by any attorney or anybody to the effect stated in his complaint?

MR. McNAB: To which we object as involving a confidential relationship as in subdivision 2, section 1881, of the Code of Civil Procedure, as to any communication made by any client to him.

A. In view of the fact that you ask me whether any such communication was made to me, and in view of the fact that objection is raised by Mr. Graham's counsel to the question, I must decline to answer.

MR. HOHFELD: Will the Notary ask the question.

THE NOTARY: Q. Did Mr. Graham state to you at or about the time of the execution of that agreement that he had been advised by any attorney or anybody to the effect stated in his complaint? Do you decline to answer, Mr. Frohman?

A. Yes.

MR. HOHFELD: Plaintiff further states in his complaint that he was by said defendant compelled in

order to secure the same to include in said instrument as further security for the defendant J. D. Spreckels & Bros. Company to the transfer by said agreement of what is known as the Klondike Spur Railroad leading from the line of Coos Bay, etc., Co. to what is known as the Klondike mine, together with all interest in the rolling stock of said railroad, etc. Will you state what knowledge you have, if any, as to the subject-matter of which plaintiff speaks in that extract from his complaint?

MR. McNAB: To which we object on the ground that the witness has already testified that his knowledge concerning these facts was obtained from communications made to him by his client Robert A. Graham. One question of Mr. Frohman in cross examination prior to your answering.

Q. Were you ever on the ground in Oregon referred to in this litigation?

A. Never.

Q. Were you ever on or about the roadway of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company?

A. I never was.

Q. Did you ever visit the Beaver Hill Coal Company's mine?

A. I never did.

Q. Do you know where the Klondike Spur is located?

A. I do not.

Q. Did you obtain your information concerning

that locality of that spur and these other properties from your client, Mr. Robert A. Graham in part or not?

A. I do not recall, and I could not state without reading the whole of that agreement, whether there was anything at all in it about the Klondike Spur.

Q. There is not, no; I will inform you of that now. I am merely asking you whether or not the information concerning any of those properties was at least in part obtained from communications from your client, Robert A. Graham?

A. I have no recollection at this time, Mr. McNab, of anything being said about the Klondike Spur.

MR. HOFELD: Q. Let me ask you, Mr. Frohman, referring back to the conversation between you and—

A. (Interrupting.) I would like to add for the information of both you gentlemen that many of the matters covered by that agreement had to do with things as to which I had no detailed information. I am referring to proceedings had in Oregon. I had some general knowledge—of course, I had to have in the handling of the case of Spreckels against Graham in the Superior Court of this City and County—but the details of the controversies up in Oregon were not thoroughly known to me, excepting insofar as they were involved in the issues in the case pending in San Francisco. Just how far they were involved in that case I cannot at this time recall, but that there were many things involved is to be assumed from the fact that we were in court 28 or 30 days.

MR. HOHFELD: Q. Mr. Frohman, referring back to the conversation between yourself and Mr. Preston, in which Mr. Preston said in substance that he wanted everything settled, did you report to your client, Mr. Graham, the substance of that communication from Mr. Preston?

A. I would say, without being able to recall what Mr. Preston said to me, that I endeavored every time I had an interview with him, to report the tenor thereof to Mr. Graham as accurately as I could recall it.

I believe I did have discussions with Judge Pierce in regard to the drafting of this agreement. I believe Judge Pierce was present at some of the times when I had my interviews with Colonel Preston. The laboring oar on the other side was borne by Colonel Preston, and that he had the most to say on that side. The relations existing between Graham and J. D. Spreckels and A. B. Spreckels were not friendly. I would expand it by saying their relations were hostile. Upon being shown certain release signed by R. A. Graham, dated June 8, 1899, to J. D. Spreckels & Bros. Company and purporting to be witnessed by myself, I state the signature "Isaac Frohman" under the word "witness" is mine, and there is the signature of Mr. Preston; also the signature of Mr. R. A. Graham.

MR. HOHFELD: We offer this in evidence and ask that it be marked: "Defendant's Exhibit 4."

THE WITNESS: That is the legal backer of Garber & Garber. I think I drew that release. On the writing dated June 8, 1899, which purports to be a

release signed by R. A. Graham, witnessed by myself and Mr. Preston, the signatures there are the signature of those gentlemen.

MR. HOHFELD: I offer the paper in evidence as Exhibit 5.

THE WITNESS (Continuing): The document dated the 8th of June, 1899, purporting to be signed by R. A. Graham, myself and Mr. Preston as subscribing witnesses, having been shown to me, I state that those are the signatures of Mr. Preston and the other gentleman mentioned.

MR. HOHFELD: I offer this in evidence as Exhibit 6.

THE WITNESS (Continuing): On being shown the writing dated the 8th day of June, 1899, signed by R. A. Graham, and witnessed by myself and Mr. Preston, I state that they are the signatures of those men.

MR. HOHFELD: I offer that in evidence as Exhibit 7.

THE WITNESS: I think documents Nos. 4 to 7 were delivered to J. D. Spreckels & Bros. Company at or about the day they bear date. All papers which were delivered at the time referred to were delivered with the purpose of carrying out the agreement which the parties had entered into. I believe Exhibits 4, 5, 6, 7, and the stipulation and the form of judgment, the agreement of June 8, 1899, were delivered at the same

time. As to what the purpose was in delivering Defendant's Exhibits 4, 5, 6 and 7, all papers which were delivered at the time referred to were delivered with the purpose of carrying out the agreement with the parties entered into; I mean the written agreements they had entered into. As far as I can remember the instruments on their face, expressed what the parties intended them to express.

On cross-examination Mr. Frohman testified as follows: I became the attorney for R. A. Graham I think in the latter part of 1898 or the early part of 1899. I have no recollection of anything being said or done after the suit was instituted. I had no personal knowledge of Mr. Graham's financial condition. My recollection is that my investigations as to the various suits that had been brought against him by J. D. Spreckels & Bros. Company were limited entirely to the suit of J. D. Spreckels & Bros. Company against R. A. Graham. My recollection is that the trial of the case before Judge Bahrs in the Superior Court of San Francisco lasted twenty-eight or thirty days. As to the counsel who participated in the trial as the counsel of Mr. R. A. Graham, I will say that there were A. A. Moore and myself, and during the trial of the case a gentleman by the name of C. M. Idleman came down and conferred with Mr. Moore and myself before we went to court. He also conferred with Mr. Graham. Also during the trial of the case W. H. Effinger came down to San Francisco from Oregon and he also, I think, consulted with Mr. Graham concerning the case. Mr. John Garber was never in the court room. The

case came to Judge Garber I believe in the first instance. I was in the case either at his request or at the request of Eugene R. Garber. I came into the case before the trial had actually commenced. I am quite clear in my mind as to that, and my recollection is that I co-operated with Mr. Moore in the drawing of the answer and the counter-claim and the cross-complaint, which was interposed on behalf of Mr. Graham, and that necessarily was before the case was brought to trial. My recollection is that the drawing of the various instruments and papers in connection with the final settlement was left very largely to me, but I may have talked with Mr. Moore and I may have talked with Judge Garber about them. It has passed out of my memory, and I cannot say. A week ago today Mr. Hohfeld showed me the instruments. I do not recall having seen them since they passed out of my hands at the time they were executed, and many of the incidents relative to their drafting and the conversations have passed out of my mind.

(Witness excused.)

(Notary's certificate.)

(An adjournment was thereupon taken until 2 P. M.)

AFTERNOON SESSION, FRIDAY, APRIL
21, 1916.

MR. McNAB: I would like to have it noted, if your Honor please, that that motion is not withdrawn.

Now, at this time, if your Honor please, because I presume it is the time that would be most favorable to the other side, I produce a telegram that I received during the noon hour from Mr. Frohman, and I will read it with the understanding that it may be considered that if Mr. Frohman was present, he would so testify.

“John L. McNab,
Hotel Portland,
Portland, Oregon.

My best recollection is I did not advise Graham agreement constituted a mortgage.”

Satisfactory, gentlemen?

MR. HOHFELD: Thank you very much.

MR. DUNNE: Thank you. We appreciate that very much.

MR. McNAB: I do that with the full consent of my client.

J. D. SPRECKELS, a witness called on behalf of defendants, being first duly sworn, testified as follows:

I am now, and for a great many years have been, president of J. D. Spreckels & Bros. Company, a corporation. Referring to the circumstances which led up to the execution of the five hundred and twenty-three thousand dollar note to my company by Mr. R. A. Graham, I am not prepared to say whether these negotiations include any personal interviews between me

and R. A. Graham. I think I was down at San Diego when Mr. Graham came to me, and wanted to know whether we would import for him or sell him rails for building a railroad in Coos Bay County, from Marshfield to Myrtle Point. I said, "What is the situation?" He said he had a judgment against the City of San Diego for some grading that he had done, amounting to \$30,000. I thought that would be a safe proposition, as the rails he would require would not amount to more than about \$30,000 or \$40,000. I thereupon wrote to Mr. Samuels asking him to give me a quotation upon the rails, which he did. I think then I turned Mr. Graham over to Mr. Samuels. The work proceeded, and we advanced the money. He was not able to pay anything; had no money, in fact; we advanced all the money for the building of the road. Afterwards it transpired that the road would not be profitable. I think it was Mr. Graham who stated that there were some coal lands that could be had, and which, when operated, would supply freight for the railroad, and thereby make it pay; and that failed. In an attempt to save what money we had into it, we went into that scheme, thinking eventually it might come out all right. It went from bad to worse. The mine was, according to reports I had received from time to time, badly handled, and handled by one who apparently did not know how to handle a coal mine. I think in 1899 I made an affidavit touching on the question as to how much money I advanced on the coal mine proposition. At that time all these things were set out when everything was clear in my mind. The affidavit mentions

the amount as \$676,146.37, and it is a fact. The circumstances leading to the removal of Mr. Graham as manager of the coal property were we were dissatisfied with the way things were going, and Mr. Graham showing no disposition to pay up any of the money, we insisted that he must get out. Mr. Chandler took his place. I recall the circumstance that Mr. Graham bought the suit referred to here on the trial of this case, against the Beaver Hill Coal Company for an accounting and a receivership, in which Mr. Hassett was appointed Receiver, afterwards supplanted by Mr. Catlin, and the J. D. Spreckels & Bros. Company brought a suit on the 9th of January, 1899, against the Coos Bay Railroad Company and others, including Mr. Graham, and in both suits I made affidavits. In a general way I recall that in both suits affidavits were made upon the adversary proceedings touching the receivership, in which various charges were made against the correctness of Mr. Graham's administrative conduct in respect to the properties. The affidavits and the imputations that were made in those two litigations were made on my part and the part of my company in absolutely good faith.

Q. In making those affidavits, did you have any intent to oppress Mr. Graham or to do otherwise than to protect your property rights?

A. On the contrary, I think—now, we paid all the moneys for the purchase of the Beaver Hill Coal Company, and gave him the privilege, if the coal mine paid, he was to have returned to him—if all the money expended in the coal mine was returned, then he was to

have one-half of the stock herein, although not having put up one nickel for the purchase of it.

Referring to my own affidavits I knew at that time the matters stated in my affidavits to be true as I stated them.

MR. McNAB: I presume this is all subject to objection, if your Honor please, on the ground it is annexing to the testimony of the witness, and is matters that were sworn to where there was no opportunity for cross examination; that it is hearsay; and that it is incompetent.

THE COURT: Very well.

MR. McNAB: This may run to all of it?

MR. DUNNE: Absolutely.

THE COURT: Yes.

PLAINTIFF'S EXCEPTION NO. 11.

THE WITNESS (Continuing): I never at any time, nor did my brother A. B. Spreckels ever at any time, in connection with the making of this five hundred thousand dollar note promise Mr. Graham that I would send him half of the Beaver Hill stock, and any life insurance policy. I was never notified in the course of the business of J. D. Spreckels & Bros. Company that any such promise had ever been made. My brother and I discussed not only this, but every matter in the operation that came up in our line of business, and that was thoroughly discussed between us, everything that oc-

cured in relation to the Beaver Hill Coal Company, and also the railroad.

Q. Mr. Spreckels, at any time, did you ever have any conversation with R. A. Graham in respect to Mr. Preston interfering with any transaction in any way between Graham and the Southern Pacific Company?

A. Well, that was a period after the litigation.

Q. We will take the period—I will draw your attention to the point of time subsequent to the settlement of these matters on June, 1899.

A. I was not on speaking terms with him, even.

Q. It has been said here by Mr. Graham that he had a conversation with you at the Waldorf-Astoria Hotel in New York in which the subject matter of Mr. Preston interfering with his dealings with the Southern Pacific Company looking to a disposition of the railroad properties involved in the Coos Bay situation, and that you said to him that Preston had no authority to interfere with him, or that business. Did any such conversation take place?

A. No, that is absolutely untrue.

Q. Did you ever at any time authorize Mr. Preston to go to Mr. George Crocker or Mr. C. P. Huntington, or anybody connected with the Southern Pacific Company, and notify him, it or them that if they should take over in any way this property involved in the Coos Bay situation, that they would be purchasing law suits?

A. I did not.

Q. Did you ever authorize or instruct Mr. Preston to make any statement of any kind touching any matter involved in the settlement of June 8, 1899, to the Southern Pacific Company, or anybody connected with it?

Spreckels—Direct.

A. I did not.

Q. Did you ever know from Mr. Preston that he had ever done anything of that kind?

A. I never knew.

Q. Did you ever hear until the litigation here, that such a thing was ever claimed?

A. I did not.

Referring to the agreement of June 8, 1899, I recall generally the circumstances that there was a suit pending in the Superior Court to foreclose the lien or pledge of these securities. I recall also that in that agreement a judgment of foreclosure of that very lien and pledge was provided for, the judgment to be stayed for six months. I knew Harry T. Creswell. He was a friend of mine. He was a member of the firm of Garber, Creswell & Garber. I think I had a conversation with Harry T. Creswell prior to the settlement of June 8, 1899, in which he talked with me about this litigation at the Club on one occasion; at the Pacific Union Club, in San Francisco; he says: "Why can't we settle this thing, and settle it for all?" I said: "Well, if it is going to be settled, it has got to be settled for all." Then I said: "I don't want to engage in any settlement. We will go and talk it over with Mr. Preston." That was the first suggestion to my knowledge looking to a settlement of this matter. The reason why a release was not taken from the Coos Bay, Roseburg & Eastern Railroad Company to Graham, as mentioned in this agreement of June 8, 1899, was because Graham was still in control of the company, and he would not

call the directors together for that purpose. I gave instructions to have the company meet and reorganize, so that such a release could be obtained. I didn't myself make those efforts, but those were my instructions. The condition of my brother's health, Mr. A. B. Spreckels, is not very good. He has suffered already two strokes of apoplexy, and at three subsequent times he had congestion of the brain. The doctor told me: "Now, keep your brother away from business as much as you can, and don't bring him anything that would tend to excite him, because if you do, it might prove fatal." I remember Mr. Dunne asking me if it would be at all possible to bring my brother up here to testify, and I told him in substance what I have just stated. I also recollect that I stated it would be indiscreet to take his deposition because it might tend to excite him.

CROSS EXAMINATION.

(By MR. McNAB:)

I will be sixty-three years old next August. I am still quite active in business yet; my memory is tolerably good. I don't recall being in New York in the fall of 1897. I will say I was not there in 1897; I doubt it; I wouldn't be positive. I have made trips there several times, not beyond four times, I think about two years ago I was in Washington, and not in New York, and I think I was there in 1893; but I have no recollection of being there in 1897. If I were there in 1897 I do not recall in particular any incident that took place there then. I have no recollection of calling on the Farmers' Loan & Trust Company, and other institu-

tions relative to getting bonds for the building of my steamships that I am running. I have never been inside of it. I made no attempt to get any bonds placed in any corporation of any banking house or any place in New York. Those bonds were all placed in San Francisco, and placed there by myself. I stayed at the Waldorf-Astoria Hotel in New York. I did take a trip from New York to Boston with Mr. Cramp of the Shipbuilding Company. I wouldn't say that I made that trip from New York down to Boston on or about Tuesday, November 9, 1897. I know I made a trip, but the year and the date I don't remember. It was at the time when I was in Philadelphia, when we were building the steamers "Sierra," "Ventura," and "Sonoma," at Cramp's. I was there at that time; that was in 1900. I went to Boston with Mr. Cramp from Philadelphia, and with others. I have no recollection of being in New York in 1897. Both members of our firm dealt with Mr. Graham with regard to the affairs of the Coos Bay Railway and the Beaver Hill Coal Company; both my brother and myself. The majority of the work connected with it was done by Mr. Samuels. Personally I did not have many interviews with Mr. Graham. My first dealings with Mr. Graham were at Hotel Coronado in San Diego. After I talked with Mr. Graham I took it up with my firm very shortly thereafter. I think I took the matter up by letter; I am not positive, but I took the matter up with Mr. Samuels. I am reasonably positive I took it up by letter. In a general way at the present time I am familiar with the terms of the contract which was en-

tered into between my firm and Graham, relative to advancing moneys for the road, the Coos Bay road. I know that I authorized the money to be expended. I think the first security our firm took from Mr. Graham was a note and then some stock, and the bonds, and I think a life insurance policy. I think that was the only security I ever took. I have no recollection when I took that security; my memory of the whole transaction is dim. I did not know one Collins of San Diego, connected with a bank there; I knew of him. I had at that time interests at San Diego. I had an interest in the Hotel Coronado in 1893. I think Mr. Collins was cashier in a bank. In the first transaction with Mr. Graham our firm took from Mr. Graham a note endorsed by Mr. Collins; that was the first transaction. After that the first security we took was the bonds and the life insurance policy, and the certificate of stock in the railroad. He was not in a position to pay the premiums and we paid the premiums on the policy. There were two policies; one was made out to J. D. Spreckels & Bros. Company and the other to his wife. We paid the premiums simply because he could not pay the premiums, and they had some value as collateral; we took them as collateral. We took them not only in conjunction with the operations of the railroad, but the entire transaction. The arrangements were made with Mr. Samuels; I don't know what we were paying Mr. Graham at that time. Mr. Graham got a salary out of the Coos Bay Railway; 150 or \$200, something like that. I do not know whether he was ever paid that salary, because I was not keeping account

of those things at all. It was my understanding that Mr. Graham was to receive this salary of a hundred and fifty or two hundred dollars a month. I could not say whether it was for his services in the railroad, or whether it was for the coal mine. The matter of whether he ever received the salary or not is a matter I leave to my subordinates. I do not remember when the salary commenced. I would not be able to state the exact date when I first demanded the removal of Mr. Graham as manager of the Beaver Hill Coal Company. It was personally done between my brother and myself. I could not say who personally demanded the resignation of Mr. Graham. I issued the order that the demand be made that Mr. Graham resign as manager of the coal mine. I think in all likelihood I issued them to Mr. Samuels. Mr. Samuels was entrusted with the affairs in connection with the Coos Bay and the railroad. I think it likely that Mr. Samuels notified Mr. Graham that his resignation was demanded. I gave instructions for the drawing up and the execution of the note for five hundred and twenty-three thousand and odd dollars by Mr. Graham. It was done by some of my subordinates, I think probably Mr. Samuels was the one. I couldn't say whether I was present at the time it was executed or not; I issued the instructions. I don't believe I recall whether I had any conversation with Mr. Graham in conjunction with the signing of that note or not. I don't know what contracts were in existence between my firm and Mr. Graham at the time of the execution of the five hundred and twenty-three thousand dollar note on November 1, 1897. When I entered

into the first contract with Mr. Graham in 1893, relative to the Coos Bay Railroad, as security I was relying largely upon the statement that he had made to me that he had a judgment against the City of San Diego for thirty or forty thousand dollars, and then upon his representation of the value of the land that he had received as a bonus for the building of the road, which I believe he estimated at two hundred thousand dollars. I think the fact that we were to take over as security the controlling interest or majority of the stock of the Coos Bay Railroad was after we made the demand upon him for the repayment of the money. I think we were also to take all of the stocks and bonds as they were issued. We also got the life insurance policy as security, and the note which was endorsed by Mr. Collins; which was worthless. It may have been the case that I received as security a deed to the lands around Marshfield that had come in the nature of subsidies. Some of these things I remember. My understanding with Graham was as to what I was to get as security at the time I commenced to make advances for the building of the railroad was that we were to get that amount that he was to realize upon his judgment against the City of San Diego; I think he was going to pay that in for the cost of the rails; and then I think we took some notes, amounting to about sixty or seventy thousand dollars. When we commenced we entered into an agreement, by which I was to advance money for the building of this railroad on the security of the stocks, bonds, and the Marshfield land. I do not think it was the understanding between us that I was to be interested with Mr.

Graham in the financing of that railroad through to Roseburg. We were just advancing the money to him for the purpose of building the road; also we advanced the money for the purpose of purchasing the lands containing the coal mines, which after he paid the amount advanced by us, he was to have half of the stock of the coal mine. There was no definite point in view at the time I commenced advancing the money for the building of the road. There was some talk about extending the road, and the surveys were made extending it to Roseburg. These advances were not made by me with that understanding; I didn't agree to that at all. I have looked over the profiles of the roadbed. Mr. Graham had them. I know that the surveys were made, but what the cost of the survey was, I do not know. I saw the profiles. Those profiles were for a road surveyed through to Roseburg. I could not say as to the time when I first learned that the coal lands were matters in which I was to become interested. According to my recollection it was not at the same time the road was started, but later. I don't think J. D. Spreckels & Bros. Company suggested the formation of a corporation to take over those lands. I do not recall how I got possession of the title to those lands. I cannot recall whether or not Mr. Graham had an option on the lands and turned it over to me at the exact cost to him. I was willing to enter into the coal venture. I thought it was a good thing for the railroad in prospect. I understood that it was for the purpose of supplying freight for the railroad. I do not recall that he was to receive any salary other than that I have stated—

one hundred and fifty or two hundred dollars a month. I could not tell whether it was in conjunction with the railroad or the coal mine; it was for one or the other. It is not true that the understanding between me and Mr. Graham was that I was to reimburse myself for these advances out of the sale of the bonds. I did not have any agreement with Mr. Graham by which I was to get a commission on the sale of the bonds. I don't think I had any agreement with Mr. Graham by which I was to get a percentage of the profits of the building of the roadbed. I think Mr. Graham probably had somebody come out from England. I remember indistinctly that an engineer came out from England. I think Mr. Graham was making an attempt to sell the bonds, or dispose of them in England; and for that purpose, an engineer was sent out to exploit the railroad and the coal mine. I didn't see the man at all; I have no recollection of seeing the report which he prepared. I do not know how long he stayed on the ground of the roadbed examining the property. I have no recollection that I paid him five thousand dollars for his report. If I had paid him five thousand dollars for making a report for Sterling & Brothers, I do not think I would recall it.

(Counsel for plaintiff reads portion of contract to witness calling witness' attention to portion thereof referring to fact that negotiations for sale of bonds shall be conducted through Messrs. J. D. Spreckels & Bros. Company, who are to receive 10 per cent commission of gross receipts of such sale, and are also to receive 10

per cent commission on amount of profit in cost of construction of the railroad.)

THE WITNESS (Continuing): That contract does not refresh my recollection. I did not understand that J. D. Spreckels & Bros. Company were to have the privilege of selling the bonds and to receive a ten per cent commission of the gross receipts of all sales. I can probably give you a reason for that. My business frequently takes me back and forth to San Diego, where I have interests, and that agreement may have been and was, probably, according to the signature, made by Mr. Samuels, probably during my absence; the business was largely in the hands of Mr. Samuels, all the details. As to whether Mr. Samuels had authority to sign up contracts involving the financing of a railroad without consulting me with regard to it, he may have consulted my brother. I don't know whether or not I was consulted relative to these advances. The thing is so far remote that I cannot remember that. I think our ultimate advances were, on account of the railraod construction, somewhere near five hundred thousand dollars. There was an expenditure, according to my testimony, of something in the nature of a half million dollars. As to whether I understood that my company was advancing that money without getting any commission on the sale of the bonds, I didn't—what I was interested in more than anything else was to get my money out that I had put in. I went on advancing and advancing until the railroad reached Myrtle Point. I don't know in what order we received the bonds. I personally did not make any effort to dispose of the

bonds; probably my firm did. I did not understand until I went on the witness stand just now that I was to receive ten per cent of the profits of the construction of the road. I have no recollection of that at all. As to whether I knew that I was getting in addition to that, seven per cent interest to be charged on the entire account, of course naturally we would get interest on the account. The agreement so states. I had no recollection of it prior to taking the witness stand this afternoon. I was not as lacking in familiarity with the details of this transaction at the time this note for five hundred and twenty-three thousand and odd dollars was executed as I am now. I was familiar with that transaction, because I insisted that that be done. I have no recollection of the fact that at that time I was to get ten per cent on the sale of all bonds, ten per cent of the profits of the railroad, and seven per cent interest on the balance which should be carried. Whatever recollection I had at that time, I insisted that these securities be merged into a note, and that the note be given to me. My father had nothing to do with the making of the note. He did not make any distinct demands upon me that this be put in a note. As to the affairs of the Beaver Hill Coal Company and its relations with Mr. Graham at the time of the execution of the note for five hundred and twenty-three thousand dollars, I was frequently away, many things were consummated in a business was that I didn't learn of. When presented to me, I would naturally ask how things were getting along, and what was doing. When a contract is made, I aim to live up to it, and then I

dismiss it from my mind. I do not bear that in my mind all the time. I have no knowledge whatever relative to the appointment of Mr. Graham as manager of the coal mine. At the time that I demanded that this note be signed up for five hundred and twenty-three thousand dollars, naturally some of the details were presented to me. I could not see that the signing up of that note and the demanding of that security was in any way a change in the contractual relations between my firm and Mr. Graham. I think shortly after the execution of the note for five hundred and twenty-three thousand dollars I demanded Mr. Graham's resignation. I don't know how shortly after. I don't know at what time it was, but I gave the orders that he should be dismissed; things were going wrong, and running in a very loose way. I do not know whether I gave the orders before or after the note for five hundred and twenty-three thousand dollars was signed. I think I ordered Mr. Samuels to draw up that note. At the time I gave Mr. Samuels instructions to draw up that note and have it signed, I think about the same time I also advised him that Mr. Graham was to be removed. My object in having the note signed up and Mr. Graham discharged at the same time was we had advanced this money, and we wanted to make it secure. We had the same securities at that time, and were running on an open account. I think it was put into a note probably on the advice of our attorneys, I don't know. Mr. Preston was our attorney at that time. I do not recall whether I had any conversation with Mr. Preston about signing up this note for five hundred and twenty-three

thousand dollars. I am afraid my memory is a little bit hazy as to whether when I told Mr. Samuels to have this note signed, this note drawn for \$523,000 I informed him also that Mr. Graham would have to be discharged from the mine. When the matters were all fresh in my mind I made an affidavit and it contains the facts. I will admit that at the time I wanted this note drawn up I had in mind the discharge of Mr. Graham, either at that time or immediately after; at any rate, at the time I drafted the note or ordered the note to be drafted I sure had in mind the removal of Mr. Graham. My brother, A. B. Spreckels, may have reported to me that the note had been signed. I do not recall whether in that conversation I demanded the resignation of Mr. Graham. I don't know when Mr. Graham was notified that his resignation was demanded. I have no recollection that I ordered any telegram transmitted to him in Marshfield demanding his presence in San Francisco. I don't think I attended the meeting of the board of directors of the Beaver Hill Coal Company at which Mr. Graham was removed. Prior to the removal of Mr. Graham from the Beaver Hill Coal Company I had not any familiarity myself with sales and delivery of coal from the Beaver Hill Coal mine. As to whether it was a fact that my firm was constantly demanding of Mr. Graham more, and more coal for San Francisco, it would be the natural thing to do if there was a demand for coal. We wanted to get more coal out certainly, to the extent that the mine was able. I don't know that we demanded coal; probably he was apprised of the fact that we had great

demands for coal. I think at the time I removed Mr. Graham that he was likewise manager of the Coos Bay Railway. I was not aware of the fact that he was not drawing at that time any salary at all. I was aware of the fact that from the Beaver Hill Coal Company he was getting the salary of \$150 a month and certain premiums on insurance. I have no recollection that the mine was shut down a few weeks after I sent Mr. Chandler up there. I think Mr. Chandler was sent to the mine in the first instance at the instance or suggestion of Mr. Samuels. I cannot say that Mr. Samuels was complaining to me that Mr. Graham ought to be removed. Mr. Samuels suggested that Mr. Chandler be sent to the mine because he was a coal miner and knew, probably, more than Mr. Graham about the operation of a coal mine; things were going along and we thought it time to get somebody who understood the business. When Mr. Chandler went up there on the first or second trip I could not tell you whether I had in mind his appointment as manager of the coal mine. I left the discretion in these matters largely to Mr. Samuels. Whatever he recommended I did, because he was more familiar with it than I was. If he said: "Fire Graham," I approved, yes sir. If Mr. Samuels said: "Bring a suit," I would approve, certainly. I won't say that anything Mr. Samuels would recommend relative to discretion or policy of the company I would approve. Those he did present I did approve of. I have no recollection that I disapproved anything he presented to me relative to the Coos Bay Railroad or Beaver Hill Coal mine. I think something of the kind

was mentioned to me by Mr. Samuels in the nature of a complaint that Mr. Graham was urging the company to acquire more lands for the development of the mine in greater capacity. I do not recall whether or not that was one of the elements of Mr. Samuels' dissatisfaction with Mr. Graham. I do not recall that subsequent to Mr. Chandler being put in charge of the mine I did proceed to acquire some of these other lands that Mr. Graham had wanted me to acquire. I was familiar with the nature of my obligations to Mr. Graham arising out of my contracts. At the time I demanded the execution of this note I was aware that the name of my firm was signed to certain contractual obligations. I didn't know about all of them. I left the matter largely in the hands of Mr. Samuels. Mr. Samuels must have called to my attention something concerning the fact that a contract existing between me called upon me for certain advances. I nevertheless ordered personally the making up of this note. I knew at the time I sent Mr. Chandler up there or authorized Mr. Samuels to send him up there that the major portion of the freight furnished to the Coos Bay Railroad was supplied by the Beaver Hill Coal Company. I never gave orders for the shutting down of the Beaver Hill Coal mine; probably Mr. Samuels did. At the time the mine was shut down I knew it necessarily would cut off a large part of the income of the Coos Bay Railroad. As to whether I was consulted prior to the order for the shutting down of the Beaver Hill Coal Company, I think there was something happened at the mine, a cave in or fire or something, but just what it

was I don't remember now. There was some good and sufficient reason why the coal mine was shut down. I have testified to the fact that I was not familiar with the details that were being carried on up there. I was relying on Mr. Samuels. When Mr. Samuels made a statement to me relative to the policy up there I believed it; he had been to the coal mine and examined it and I had never been there. I think I got into a controversy with Mr. Graham after the note was made, no, I think possibly before. I cannot recall whether it was before or after. The source of my information relative to affairs there was Mr. Samuels. I recall that the trial of an action against Mr. Graham brought by my firm for the recovery of \$523,000 was interrupted in order to consider the question of drafting some contract. It is a fact that I attended that trial every day. My attorney was E. F. Preston. Judge Preston was my confidential friend and adviser. I do not recall how much was due on the note at the time, how many months' interest were in default. I have no recollection that there was a dispute between Mr. Graham and me relative to the fact that he had a credit in my hands for more than two months' interest at the time it was commenced. I recall it was a very bitter trial. I did not have any personal consultation with Mr. Graham during this period of negotiation leading up to the approving of this instrument. I left that to Mr. Preston. If Mr. Preston was threatening to put Mr. Graham in jail probably there was good reason, if he made that threat. I don't know whether he made the threat; I didn't hear it. My brother, A. B. Spreckels comes down

town every day for a limited time. He is unable to walk any distance, and when he does walk he requires assistance. He and I hardly discuss business affairs. He occupied his office and I mine. The instructions that I have given to the different offices of the different branches of the business, are not to bring any business matters up to him at all; wait until I get back from San Diego, and if they can't wait telegraph me, and I will come back. Those are things under the doctor's orders. There were no negotiations between Collis P. Huntington and me relative to the purchase of the Coos Bay Railroad. I did not know of any negotiations passing between Mr. Graham and Collis P. Huntington relative to the purchase. I never heard of any negotiations passing between Mr. Graham and Mr. Harriman; never heard Mr. Harriman's name mentioned in connection with Mr. Graham or at all. I have no recollection of ever hearing any statement of any kind made by Mr. Graham relative to the Harriman interests in any manner. I never personally discussed with Mr. Harriman the purchase of the Coos Bay Railroad. I did not call on him and suggest the buying of it. I was not acquainted with Mr. Harriman at all. I never called on him in New York. I never discussed with Collis P. Huntington the purchase of the road. I never took up with him any question of the negotiation describing the contour of the road or anything of that sort. I have never been up to Coos Bay so I could not give him any surveys. I never gave him any surveys. I never gave him any profiles or anything of that sort. I am absolutely clear on that. I sold out this railroad

and other properties which are the subject of dispute in this action to the Southern Pacific. Besides the other properties that were involved in this transfer beyond the land at Marshfield, the Coos Bay Railroad stock and bonds and the Beaver Hill stock there were two steamers, the "Cazarina" and the "Breakwater." I think I paid fifty thousand for one steamer and seventy-five thousand for the other. They came out here and we expended considerable money on them. They were second hand boats when we bought them. The value of those two steamers when I sold them to the Southern Pacific was about a hundred and fifty thousand. The cost originally was a hundred and twenty-five, but we expended a good deal of money and the "Czarina" had what we call a well deck, and we decked her over so as to increase the capacity for carrying coal. When we sold out those properties to the Southern Pacific I received about a million dollars. I think that is about the correct amount, for the whole thing. I do not think it is a fact I sold out for one million three hundred thousand dollars. I don't recall when we sold it; we sold it in one lump sale. I think we got the money in cash. There was no bonus or commission paid in addition to that. A commission was paid, however, to a Mr. Smith who negotiated the sale. I think Mr. Samuels paid Mr. Smith his commission. It was paid by our firm. It was Mr. James Smith who was the general manager of the Western Fuel Company. Mr. Samuels carried on our negotiations with Mr. Smith. I do not think my firm ever supplied Mr. Huntington with the profiles of the

road and that sort of thing. I don't remember that I ever had the profiles of the road in my possession to give to anybody. To my knoweldge there were no negotiations being conducted relative to the taking over of this property prior to the death of Mr. Huntington. The only thing that I remember or recall I think the statement came from Mr. Graham, probably from Mr. Samuels, that the Chicago, Rock Island were contemplating coming to tidewater by way of Coos Bay and I believe he said that that company's surveyors were out there, engineers. I was a witness before the Interstate Commerce Commission relative to these affairs, at San Francisco, January 29, 1907, shortly after the sale to the Southern Pacific. I believe on that occasion this question was asked me by Mr. Severance and I gave the following answer:

“ MR. SEVERANCE: And with whom did
“Mr. Smith have his dealings?

“ MR. SPRECKELS: With myself and also
“with my brother. I felt at the time that he was
“negotiating for the Southern Pacific, because at
“the time that Mr. Collis P. Huntington was still
“alive they were then looking into the propositon
“of acquiring the road, because they wished to
“overcome the grades on the Shasta Mountains
“rather than haul the wheat, as they did, up to
“Portland, and then bring it down by steamer, that
“they could cut off about three hundred miles up
“and three hundred miles back, or six hundred
“miles in all, by going into Coos Bay. And they

“having, as I say, during the lifetime of Mr. Huntington, looked into the proposition, and we supplied them with the surveys and different things, and a list of the property that we had, and then the negotiations were never completed because Mr. Huntington died about that time.”

I believe I did so testify. Let me correct my statement there. I didn't have any conversation with Mr. Huntington at all. I remember now since you read that testimony to me that Mr. Kruttschnitt came to my office and asked whether we had the surveys of the Coos Bay Road from the extension; went up the canyon from Myrtle Point, I think, up towards Roseburg. He wanted the profiles and I let him have them. I probably got them from Coos Bay, I think, or from Mr. Samuels. My candid opinion and impression is that we sold these various properties to the Southern Pacific for one million dollars, no more and no less. I think if I had sold them out for more, two or three hundred thousand dollars more, I would remember it. I paid James Smith, the Manager of the Western Fuel Company of San Francisco, a commission, the amount of which I don't recall. In reference to the testimony I gave before the Interstate Commerce Commission in San Francisco, taken on the 29th day of January, 1907, as follows:

“ MR. SEVERANCE: Then as I understad
“you, the whole story is that you built this road,
“put on those steamers, did this business at the coal
“mine, put in a million dollars, the property was
“operated at a loss, Mr. Smith approached you on

“behalf of the Southern Pacific to buy you out and
“paid you one million three hundred thousand dol-
“lars for it.

“ Yes.”

That apparently is my testimony, but I think I must have been in error at that time about the three hundred thousand dollars. My firm recollection is that it was only one million dollars that we got for it.

(Witness excused.)

W. S. CHANDLER, a witness called on behalf of defendants, having previously been sworn, testified on further DIRECT EXAMINATION, as follows, by MR. DUNNE:

I am in the banking business at present at Marshfield, president of the First National. I have been president of the First National Bank for about eight years. I have lived in Marshfield since about December, 1897, with the exception of about two and a half years. I went up to this Beaver Hill Coal mine some time in 1897 at the instance of John D. Spreckels & Bros. Company. At that time I had been manager of coal mines for about twelve years prior to going there. I was at Carbon Hill in Washington for about two years; from there I went to British Columbia to the East Wellington mine. I had my instructions from practical mining engineers. I was assistant superintendent of the Carbon Hill Coal Company in 1880. I had a professional license or certificate from the board of mining engineers of British Columbia. Afterwards I was one of the ex-

aminers with the board for a number of years. I went to the Beaver Hill Coal mine in 1897. I made two visits prior to being appointed manager. I was up there the first time about 28 or 29 days. I made an examination of the property at that time. I found the mining property in a dilapidated condition. The underground workings, with the exception of one gangway, you might say two, one was closed shortly afterwards—were practically closed. I have the blue print here of the workings. I can show where the underground workings on the west side of the slope were practically all ruined; No. 3 level down below No. 3 gangway was being extended at the time I was there, but a fire occurred in it afterwards, a gob fire close to the bottom of the slope which cut that slope off. It seems afterwards they drove a tunnel around it and tried to head it off, but it was no use, the ventilation was bad. The only available coal at the time I took charge was in gangway No. 4. I instructed the superintendent who was working under Mr. Graham at that time, whose name was John Curren, to start his inner workings on the chute and pillar system, and he drove up a number of chutes and that is all the coal that was available after my return to take charge for J. D. Spreckels & Bros. Company. The amount of it was approximately six thousand tons. When I went up there to examine this mine the conditions of the pillars of the roof were in bad condition throughout. A great many of the pillars had been withdrawn where they should not have been and a great many gobs were heatings and the workings in general were of no value at all. I mean by "pillars being with-

drawn" that coal had been removed from the pillars that should not have been touched at all. That is what is called "robbing the pillars." I made a detailed report in respect to this mining property set out in my affidavit. It is a correct report of the condition I found there. I made a report to J. D. Spreckels & Bros. Company of the condition in which I found the coal mining property, both written and verbal. During the time from June 8, 1899, up to the time that I took possession I informed them as to the condition of the railroad property. I was appointed manager approximately December 3, 1897. During the time I was making my investigation of the mining property I saw Mr. Graham, and had conversations with him at that time. He broached the subject in respect to the character of the report I was to make to the J. D. Spreckels & Bros. Company; that was during my first visit. The circumstances were I was stopping there in his house. He said something at the table about making a report and his wife answered: "Oh, he couldn't make anything but a favorable report," or something to that effect. I subsequently had several conversations with him in respect to the report. He wanted me to make a favorable report, and going down to the train together he wanted me to make a favorable report and he offered me a bribe. I rather think it was twenty-five thousand dollars at that time. The proposition touching the acquisition of further properties was taken up at different times. He told me at the time when I went there first that he was prospecting at that time on the Chadwick tract. It was his intention at that time for J. D. Spreckels and

Brothers Company to purchase that tract and when I returned he took it up again. The substance of what was said by him to me in respect to recommending this additional property to the Spreckels' was if I would make favorable reports, up to the time and during the time I was around there he was bonding all the surrounding properties around Beaver Hill, and he made a proposition to me at different times, made me four offers. It seems to me the first one was twenty-five thousand dollars, and I didn't take to it very kindly, and he came in a day or two afterwards and offered fifty thousand dollars, and he finally got it up to a hundred thousand dollars, and he also at that time said that he would either give me a check or an order on T. R. Sheridan in Roseburg at the First National Bank for ten thousand dollars. I reported these conversations to Mr. F. S. Samuels of the firm of J. D. Spreckels & Brothers Company. After I was appointed manager of the mining company and went upon the ground I did not shut down the mine immediately. I got out most of the six thousand tons of coal and then when that was taken out there wasn't anything further left to get but the rails, pumps and mining appurtenances. In regard to the freight rates, about the end of January—I couldn't say as to the date without referring to the letter, I got a notice from J. B. Hassett stating that the freight rate would be raised and increased from fifty cents to a dollar a ton and that beef from twenty-five cents a quarter to one cent a pound. The notice from Hassett was a letter from Hassett raising from fifty cents to a dollar, and we got our freight

bills. Then they increased the storage of coal in the Marshfield bunkers ten cents a ton. I had been manager of the property about two months before I shut the mine down. I did not remain a great while after that. Mr. Hassett was appointed for Mr. Graham and then shortly after Mr. Catlin. In that proceeding in which Graham brought a suit, Hassett was appointed receiver and subsequently superseded on the order of Judge Bellinger by Mr. Catlin, according to the judgment roll here. I filed an affidavit in that proceeding. The circumstances were more fresh in my memory than they are now. I made that affidavit in good faith.

MR. DUNNE: Q. Were the facts as stated by you in that affidavit true, as you understood them to be at that time?

A. Yes, sir.

MR. McNAB: Just a moment; will you kindly refrain from answering questions until I interpose my objection?

A. I didn't notice.

MR. McNAB: I desire to object to that, if your Honor please, on the ground I heretofore urged to a similar question asked of Mr. Spreckels, on the ground it is utterly incompetent and calls for hearsay testimony and ex parte statement of the witness made long prior to this time when he was not subject to cross-examination.

THE COURT: Very well.

PLAINTIFF'S EXCEPTION No. 12.

THE WITNESS: (continuing) At the time I made this affidavit I had no intent or purpose to oppress Mr. Graham. I never received any instructions from J. D. Spreckels & Brothers Company or any one connected with them to make any statement against Graham that was not true. I was never instructed by them or any one connected with them to say anything or to do anything either in the course of the litigation or otherwise to oppress Graham. I expect I also made an affidavit in the case of Spreckels against the Coos Bay Railroad, substantially like the affidavit which you made in the other case. The same things were true in respect to that affidavit as I have said of my affidavit in the first case. Then I became receiver of the Coos Bay Railroad Company. That was January 8, 1900. Prior to that I had taken possession of the property, the office and property of the company; that was the 18th of December, 1899. Mr. Graham was not at Marshfield at that time, nor has he been residing there in Marshfield since said 18th day of December, 1899, or in Oregon since that date. I remained in possession of the property from the 18th of December until my appointment as receiver. I was in charge as receiver from January 9, 1900, until July 1, 1907; January 8, 1900, until July 1, 1907. I had no personal relations or transactions with Graham during that period. I have been more or less connected with Marshfield since 1897. I know this Railroad Addition referred to in this proceeding which Graham got as a subsidy or bonus at the time that the road was first

launched. In 1906 probably that property was worth about fifty thousand dollars. In 1899 I don't suppose it was worth much over twenty or twenty-five thousand dollars. A great many of the blocks were marsh land adjoining what they call the railroad reserve, and was just used for pasture mostly. It extended out to what they called Coal Bank slough and over a hill there; lots of those lots at that time were not worth over ten dollars apiece; lots of them you couldn't sell at that, at the slough and over the hill. It was given by Merchant. This was down on the marsh, next to the salt water, between the bench land and salt water. When I went into possession of the railroad property in December, 1899, its condition was considerably run down, the roadbed—there had been no ties—the roadbed was becoming in a more ruinous state every day and for that reason I telegraphed to Mr. Samuels warning that the roadbed, bridges and ties, all the woodwork along the road were all going to decay. The rolling stock was in bad condition, and as soon as I took possession and was appointed receiver, I immediately placed orders for thousands of ties and got tools and started in with one of the bridges and cutting off piling and putting new posts under the decks of the bridges and also used all the rock I could from the mine to fill in the trestle work.

CROSS-EXAMINATION.

(By MR. McNAB:)

I am 58 years of age. My father was a stockholder in the Carbon Hill Coal Company. There were sev-

eral people in it. My father owned the controlling interest in it, and he sent me up there. I went to South Wellington for a while; my father was interested in that; he practically controlled that mine; my father sent me up there. In learning my trade I went to three mines. My father owned the controlling interest in all three. Prior to being sent up to Beaver Hill by John D. Spreckels I had been examining mines. I lived in Alameda. In answer to your question whether I was living there in Alameda on an allowance of forty dollars a month furnished by my father, I will state that I do not know—I do not recall any such fact. In response to your question whether I had married a woman with a hundred and fifty thousand dollars and had gone through that I will reply that that is not a fact. The property I have now I had a good deal of my own before ever I got anything from my father. It is not a fact that the property I had either developed out of just what my father gave me or what was absolutely given me by my father. In reply to your question whether or not at that time I was living there on an allowance which my father allowed me, subsequent to dissipating the fortune he gave me, of forty dollars a month, I will say that I recall no such fact. In response to your question whether or not I was twice graduated from the Keeley Institute, I will reply that I was not. I got a salary of four thousand dollars a year from the Beaver Hill Coal Company. My salary continued after I shut down the mine. When the mine was closed down I was going to develop a new mine across the marsh from the old mine. I was driving

at the time it was closed down. I had made six cuts at the time I received notice from Samuels to shut down the mine. I had been there about sixty days. This place, this mine, that I went over to and commenced to open up is the place that had been opened up a little before that by Mr. Graham. It was started by Mr. Graham. I started in the same hole where Graham started and went to work. Mr. Graham was driving a tunnel at that time and was in a fault and didn't know where the coal vein was, and I told him to turn that gangway, which he did. When I first went up there I did work at the Beaver Hill. I started to extract coal from gangway No. 4. When I arrived there I would say about sixty tons of mine ran, which means lump coal, going over the line of railroad. I sent over approximately 100 tons a day while I was there. There were about six thousand tons of coal blocked out that were available for mining. I started operations to remove it. I took out about six thousand tons; shipped it all over the railroad. I received notice from Mr. Hassett, such as has been introduced in evidence here, notifying me that if I would supply 100 tons a day I could have a rate of fifty cents per ton and a reduction of ten cents a ton on each one hundred tons per day over the first hundred until you got down to thirty cents. I could not say how long it was when I went over to this other place where I commenced development work on the place opened by Mr. Graham. I could not say how far I found the drift had been run into the ground; at that time I would say about six or seven or eight hundred feet. When I went there

they were getting out about sixty tons of coal, and on the payroll were about two hundred men for that sixty tons of coal. Within sixty days after I went there I discharged over a hundred men and shut down the mine. I had no more work for them. In No. 1 Beaver Hill the fire had broken out long before I got there. I was there when a fire broke out in the Beaver Hill Coal Mine; that was before I took charge, when Mr. Graham was there, because I told him about drawing out the debris from the gobs and taking it out of the mine. A man by the name of John Curren was superintendent of the mine under Mr. Graham. He was simply a coal digger; he was not educated in any university. He was a pretty good man. I kept him there for quite a while, until I closed the mine. At the time the mine closed down I had taken out six thousand tons of coal; there was a fire burning in the mine and the mine was practically ruined. I didn't do anything on the other workings. I stopped. As soon as Mr. Hassett took charge I was through. Mr. Hassett took charge somewhere about the end of January or beginning of February. The mine closed down just before that time. The mine shut down itself before Hassett ever came as receiver. It had been shut down a very short time before Mr. Hassett arrived on the ground. Mr. Hassett was appointed in June. The difference between February and June, several months, new mine was being developed. It was not a very good prospect, but I continued to work on it. I drove it out to the boundary line. I did not take very much coal out of it. I could not say how many men I carried on the

payroll. I got four thousand dollars a year; that continued as long as I was working for J. D. Spreckels & Brothers Company as manager. I quit as manager of the Beaver Hill Coal Company on December 1, 1907. I had been receiving \$4,000 a year ever since I was appointed manager up to the time I left it. I had been receiving \$4,000 a year from the time Mr. Samuels sent me up there about the end of 1899 to 1906. During the time I was receiver of the railroad I received salary at the rate of \$200 a month. I was receiver for seven years, from 1900 to 1907. I got \$2400 a year for seven years, and during that time I was drawing \$4,000 a year as manager of the Beaver Hill Coal Company. I commenced getting \$4,000 a year in 1897 and that terminated in 1906 or 1907; that was ten years.

I could not tell how much of my time I devoted to the Beaver Hill Coal Company; whenever I was wanted I went there; whenever I wasn't wanted I was attending to other work. I guess I devoted my time continually to the running of the railroad or to the running of the mine. During the time I had been drawing \$4,000 a year from the Beaver Hill Coal Company the Beaver Hill Coal Company had not been operating continually. During this time I could not say how much of the time the mine was not turning out coal; there was more or less coming out all the time. It had been shut down at times when there was no coal coming out over the railroad at all. Sometimes we might have ten men on the payroll, sometimes a hundred. During the time I was getting \$4,000 a year

sometimes maybe I would go a month without sending any coal over the railroad; sometimes maybe two or three months. It may be one solid year without sending out a single car of coal over the Coos Bay Railroad. For that year I received \$4,000 from J. D. Spreckels & Brothers as manager of the mine. I don't know whether it was the same mine for which Mr. Graham received \$150 a month and premiums on his policy. All the reconstruction of the railroad was done according to my instruction. I was at Marshfield attending to the correspondence. I would go over the road and inspect the road many times. I saw to it personally that the railroad kept running at the time. In response to your question whether I know that there was a protest filed with Judge Bellinger of the Federal Court here on the ground that I held up a train down there at a station when I had been drinking heavily, and the whole train was held up half a day, and there was a protest to Judge Bellinger in regard to it, and Father Connelly headed the committee, I will say that I never heard of such an incident at all. I have no recollection of it whatsoever. In response to your question what I claimed to be doing for \$4,000 a year when I had shut the mine down, I will state that all I could do was to see that the development work was going on; that was about all.

I don't know how much coal they are producing now; I don't know anything about how long it has been since they produced a single ton; it has been nine years since I was there. I was there during 1907; I was not turning out very much coal in 1907; I turned

out some; I don't know just how much. I presume as much as a ton a day. In response to your question, "Well, you were getting \$4,000 a year, weren't you to manage that mine, and can't tell how many tons you turned out," I will reply I could not tell how many tons for any particular month or day or year. I can't give the Court an estimate because I do not know. And in response to your further question, "Were you receiving any complaint from Mr. Samuels during any of this time you were getting \$4,000 and not getting out coal," I will reply that I never received any complaint.

(An adjournment was here taken until tomorrow, April 22, 1916, at 10 A. M.)

APRIL 22, 1916, AT 10 A. M.

MR. McNAB: If your Honor please, I offer in evidence deed by J. D. Spreckels & Brothers Company to the Southern Pacific Company, dated July 2, 1906, and recorded July 31, 1906, for the purpose of showing that at the time the Southern Pacific took this deed from J. D. Spreckels & Brothers Company there was a complete gap in the title.

MR. HAMPSON: If the Court please, in line with counsel's statement as to the purpose for which this deed was introduced, it seems proper to call the attention of the Court to the fact that at the time the deed from the Spreckels Company to the Southern Pacific was executed, the deed from the Spreckels Com-

pany to the Bank of California was not recorded, and therefore as far as the record disclosed the title was complete.

(The deed is marked: "Complainant's Exhibit No. 45, J. D. Spreckels and Bros. Company, being the party of the first part, and the Southern Pacific Company, the party of the second part; the party of the first part, in consideration of the sum of ten dollars, and for other good and valuable consideration, has granted, bargained, sold and conveyed unto the party of the second part certain real property situated in the County of Coos, State of Oregon, subject to certain stipulations, covenants and agreements contained in a certain deed executed to the party of the first part by Thos. Wilson and L. E. Wilson.)

W. S. CHANDLER, recalled for further CROSS-EXAMINATION.

(By MR. McNAB:)

When I arrived at the Beaver Hill Coal Company, after being appointed manager, I made an appraisal of the inside of the mine to ascertain how much coal there was available. I found six thousand tons. I did not find any that was available in the first gangway, or any that was available in the second gangway; none in the third; bout six thousand tons in the fourth gangway; I mean by "available" coal that could be extracted. Between my visit when I went up to inspect the mine and make my report and the time that I came up there to begin work as manager the third

gangway got on fire, and No. 1 gangway was filled with black damp; every coal mine has black damp, but not when ventilated. The coal was there, but it was not available; couldn't get any ventilation in the premises. The reason I say it was not available in gangway No. 1 was because of black damp and the heat of the fire coming up from No. 3; gangway No. 2 since my prior visit had become badly squeezed and wasn't much coal in it. It is a fact that in the report which I made to J. D. Spreckels & Brothers Company just a few months prior to that, I made the following recapitulation of the coal in the different gangways: In gangway No. 1, 131,022 tons; in gangway No. 2, 29,244 tons; in gangway No. 3, 104,328 tons; in gangway No. 4, 69,949 tons; making a total of 334,543 tons; but I said that only forty per cent of that was available. Within a few weeks after I went up there I shut down that mine and moved over to this chute on which Mr. Graham had been working, took a crew with me and started to drive a slope. I put the gangways a hundred yards apart. Those gangways after I had been operating them collapsed and crashed in destroying the mine, but not until the coal was taken out. I was taking out coal from the new place from the time we started development work until I quit. The 800 feet that Graham had driven in before I got there is not what I have reference to as development work. The mine I was working on after I closed the old mine was separated from the first mine by a swamp. I suppose I had about seventy men working when I started. The whole top levels of that mine did not catch fire;

there was a fire in the gangway—wood caught fire in No. 6 gangway. It burned until I flooded it; that took about two weeks; we would block it off in chutes; it was simply caught in the cogging. We did not lose any coal. I could not get in gangway No. 2 in the old mine to see the effects of the fire. I did not refuse to go into the lower levels of that mine when I first went up there. We had a fire in the new mine, in the wood, in the pot hole; that is all. If we had put water into the lowest gangways, No. 3 and No. 4, we could not have been working No. 1 and No. 2 because we couldn't get any ventilation. According to my report No. 1 had 131,022 tons and No. 2 had 29,244 tons. I mean to tell the Court I abandoned the mine solely on the question of ventilation and the heat. I went off and left 160,000 tons of coal simply on the question of ventilation and the heat; some of the gobs that were heating there. I could not say as to how many tons of coal I took out of the new mine; I shipped all the way from forty, two carloads, up to twenty; two cars to twenty. When I first started to open the mine I shipped out forty. I continued to ship for the first year. I did not start right in where Mr. Graham left off the development work and commence to ship the greatest amounts of coal I ever shipped out. I started to ship coal as the development work would permit. I suppose I was keeping probably ten or twelve men there during the time I was not shipping out any coal at all. When I left there Mr. Hassett took the receivership, but my salary ran on at half pay. Mr. Hassett was there about six weeks. After Mr. Catlin was appointed

receiver I did not continue to run the mine, but my salary went on under half salary. Mr. Catlin was there about a year. During that time I did not go to the mine at all. I went up there two or three times but I was absent from Coos Bay a good deal. I came to Portland and went to San Francisco and all the time I was drawing half salary, and I was not going near the mine at all; and I was not performing any labor in conjunction with the mine. I did not have anything to do with the railroad then as receiver at that time. During the time I was receiver the court allowed me \$200 a month. I built a hotel at Marshfield after I left the employ of the Southern Pacific, about the fall of 1908. I did not show Mr. Graham the report which I made; he did not know what was in it. I did not consider it a favorable report, not the condition the mine was in. The first time I went up there Mr. Samuels in the firm of J. D. Spreckels & Brothers Company employed me. He simply asked me to make a true report of the condition of the mine; subsequently he sent me up there to keep the record—or to watch the boring, the drilling, which was going on on the other property. That was not on the Beaver Hill Coal mine; it was going on with a view to experimenting on continuing the ledge into the other lands which Mr. Graham thought the company should acquire. I presume it was at Mr. Graham's suggestion these drillings were being carried on. I believe I am positive that this first bribe I talked about was on the train going to San Francisco. I am pretty sure. The only discussion before this was at Mr. Graham's house when Mrs. Gra-

ham said: "He would make a favorable report," or words to that effect. The first conversation in regard to this alleged bribe took place on the Pullman train going to San Francisco. I did not say anything at all in reply. I did not make any response at all to it. I had been personally engaged in the employ of J. D. Spreckels & Brothers through Mr. Samuels. I went back there with a report of the condition of that mine to Mr. Samuels. I discussed it with him. I told Mr. Samuels that Mr. Graham had tried to bribe me. I did not have a copy of my report with me as I went down on the train; just merely notes. I did not tell Mr. Graham anything about the contents of your notes. It took me a couple of days to prepare my report. I don't recall the conversation between Mr. Samuels and me when I told him that Mr. Graham had attempted to bribe me. I do not recall the details of the conversation. About a week after that Mr. Samuels said he wanted me to go back to the mine. I don't think I made a report that Mr. Graham was trying to do up the company, do up the mine, and so forth. I believe it was something like \$1,000 that I was paid when I got through. I have not a copy of my second report. I think the next time he approached me with a bribe was after I went back to take the management. This took place in his office. No one was present. I could not say the time of day. I think it was during the month of December. I told Mr. Samuels. I believe I wrote him about it. I simply said he had increased his offer from twenty-five to a hundred thousand dollars; he increased it by steps. The second step was

\$50,000. For this \$50,000 I was to make a favorable report on all those lands which he had under bond or option. I did not say anything. I had never been called upon to make a report on the lands Mr. Graham had under option. The \$100,000 offer was made at Marshfield; I could not say how soon after the \$50,000; nobody else was present. It was in the month of December; I could not say whether it was day time or night time; I couldn't say when it was. I don't recall the conversation at all. I worked at a desk in Mr. Graham's office at different times. I went to the Blanco Hotel when I first went up there and Graham came over and insisted on my going to his home, the day I got there. When Mr. and Mrs. Graham left for the East they may have left me in his private residence with Mr. P. N. McLean. I probably was there, is the best of my opinion. I can not recall the conversations when he offered me the bribes. During the time the receiver was there when I was doing nothing, I was getting payments of \$2,000 a year. I built a new depot entirely. J. D. Spreckels & Brothers Company were putting up the money to improve the railroad, during the time I was receiver. I should say during that time that they put up probably two hundred thousand or thereabouts, I could not say exactly; that was during the time I was operating as receiver. They put that money in new ties, new decks for all their trestles, new depot building at Marshfield and Coquille, extension of wharf, new warehouse and increasing the equipment; that was while I was receiver. I lived up stairs over the depot. I built a new depot and

built a residence portion up stairs and moved into it. During all this time Spreckels & Brothers Company was putting up the money that was necessary to improve this railroad. It was not paid for out of the earnings of the railroad. The earnings of the railroad were not enough to pay it. We hauled rock and other material down from the mine and dropped it into the trestles. All of this stuff I hauled down and put in was stuff I had to haul away from the mine, and I dropped it into the trestles to get rid of it. I believe Mr. Graham was doing some of that at the time when I supplanted him. I do not recall making the following report, but it is the report I made as receiver:

“That all of said property has been repaired and
“greatly improved by said receiver; that the road-
“bed has been improved and repaired by the con-
“struction of new bridges, laying new ties and
“rails, reducing grades and curvatures, replacing
“lengthy trestles by fills, construction of new side-
“tracks and switches and new and improved tracks
“at the Marshfield terminal ground and by the
“construction of new depots, section houses, a
“roundhouse and a warehouse along the line of
“said railroad, and that all of these improvements
“have been done in a careful and economical man-
“ner with a view of placing the said roadbed in a
“suitable condition to carry on the railroad busi-
“ness of said railroad company.”

I presume that is the report I put before the Court at the time I was asking for the money I was to receive as

receiver. In the petition, which is signed by me, is this statement:

“And that such improvements have been made and
“paid out of the earnings of said railroad while un-
“der the management of said receiver.”

I don't suppose that statement was meant in that way. I cannot very well explain that about the earnings. It took all the earnings and what the J. D. Spreckels & Brothers Company advanced to acquire this additional equipment and make these improvements.

Q. Was that statement which I have just read to you true or false?

A. Well, it wasn't meant in that way, I don't suppose. I can't very well explain that about the earnings. It took all the earnings and what the J. D. Spreckels & Brothers Company advanced to acquire this additional equipment and make these improvements.

Q. Was the statement you made here to the Court in your petition to have an allowance given to you for your work as receiver, which I have just read to you—was it true or was it false?

A. Well, I—I—I can't say. The way that—Mr.—the Court was familiar with all the advances that I was getting and Mr. Couch Flanders was handling that part of it. I signed that all right, but that is all I can say.

I did not divide the commission which I received out of the same to the Southern Pacific with Mr. Fred S. Samuels.

(Witness excused.)

F. S. SAMUELS, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

(By MR. DUNNE:)

I am the Frederick Samuels who has been referred to in the proceedings here as the acting secretary of J. D. Spreckels & Brothers Company. I have been connected with them about 33 or 34 years. I recall the fact there was a sale of these Coos Bay properties to the Southern Pacific Company. I did not receive one dollar of commission from anybody in connection with that transaction. The circumstances that led up to the making of this five hundred and twenty-three thousand dollar note were that in the year 1891 Mr. Graham bought some rails from us for which he gave two notes of seventeen thousand dollars each; and one or both notes—I forget which—were endorsed by Mr. Collins, who was the cashier of some bank in San Diego; and at the time that he gave these notes, he gave ten thousand and one shares of the Coos Bay stock and the title to the railroad lands in Railroad Addition, Marshfield, and he promised at that time as soon as these rails were laid, that reached ten miles of road, or possibly it was one mile of road, that the Farmers Loan & Trust Company would issue bonds and then as fast as these bonds came in he would turn those in to us as further security. After he laid these rails down on the road, the road practically ended nowhere, and we sent up a man named Creighton who was to report on the road, or see what he thought about it, and what our chances would be for our getting repaid for the ad-

vances that we had made on those notes. He came back and reported that if we wanted—Graham hadn't any money—that the only way to get our money out was to put more money in, and go to Coquille City, and then possibly the revenue derived that way, why, we might get something back. We went to Coquille City and it was the same old thing—to go to Myrtle Point; Coquille City doesn't give you enough revenue. We kept gradually putting money in. Meantime we had the notes, and we had an open account where we were sending up money whenever he would requisition for it. Finally this ran along till 1897, till we had accumulated something in the neighborhood of about five hundred and twenty-three thousand dollars, against which we had an open account and a couple of notes. These notes may have been merged into one note of thirty-four thousand dollars by this time. Having this open account and these notes and having all these collaterals, I consulted Preston, our attorney, showed him the state of things—asked him what was best to do. He said: "You better merge it all into one note." So we merged all those securities that we held from the beginning. The bonds, as often as we would receive them, would simply come in to us. We had an order from Mr. Graham to the Farmers Loan & Trust Company, telling them that, as fast as these bonds were issued, and the engineer would approve them—under the terms of the trust agreement, no bonds could be issued until the engineer of the road certified to the road being properly laid, and so on. In November, 1897, acting under the advice of Colonel Preston, he drew

up the form of the note so as to cover everything, and he brought it down to the office and then tried—I don't know much except that the note was handed to me by Mr. Gibson and Mr. Spreckels to get it signed. I did not know of any statement having been made to Mr. Graham that if he would sign this note, he would get half the stock of the Beaver Hill and life insurance policy. Regarding the life insurance policies, during the time that we were sending up money—we had already commenced operations with Mr. Graham in Beaver Hill Coal Company; and he was also operating the railroad; of course the railroad belonged to him—the Beaver Hill Coal mine belonged to us; but we had a contingent interest in it under certain conditions which are set forth in a special contract. I was up there one time and we got discussing expenses up there, and Mr. Graham asked: "I am not drawing down anything, and I have got to have something to live on." I said: "How much do you want?" He said: "One hundred and fifty dollars a month," and he said: "I have also taken out two insurance policies, and if you will keep the premiums paid up, that is all I ask for." After he made that proposition when I reached San Francisco, I told Mr. A. B. Spreckels about it, with the result that Mr. Spreckels accepted the proposition, and I put it in writing; you have it there. At the time that the note was executed, the five hundred and twenty-three thousand dollar note the earlier notes might have become outlawed pretty soon. The notes had matured. The book account was payable. The new note that we issued gave him a year's extension of time. No addi-

tional security was taken from him that we didn't already have underlying the account at the time the five hundred and twenty-three thousand dollar note was made. The circumstances leading up to the coal mine phase of this business were when the road reached Myrtle Point, about 1893, Mr. Graham had an option on some property called the Norman property; naturally having so much money in the Graham note as we had, we were willing to listen to most anything that would seem to offer a solution to enable us to get our money out. I went up there at the time and Mr. Graham took me to show me the property. We walked through the swamp—I think he had done a little grading on the spur—but I remember crossing over to the Beaver Hill property; he showed me this opening. I didn't know what it amounted to, but it looked big to me; the timber was all right. He suggested that at a very small expense, a very large body of coal could be opened. It looked so to me, so that seemed to be a solution of the possibilities of getting our money back out of the road, which at that time amounted to probably four hundred and fifty or five hundred thousand dollars. I talked to Mr. A. B. Spreckels about it. The final upshot of all this was that Mr. Graham held this option, what we called the Norman option, and an agreement was drawn up by his attorney and submitted to us. I believe that at this time I was with Mr. Graham in Mr. Deering's office when we drew this agreement up. Up to the time of the receivership suit in 1899 we had put about six hundred and fifty thousand dollars into the Beaver Hill coal property,

somewhere around there. The circumstances under which Graham ceased to be manager of that coal property and how Chandler came up there were that we had six hundred and fifty thousand dollars in there, the amount of coal that was coming out of the mine was simply absurd in quantity, and what was coming was dirt; not only was the coal getting unsalable down there, getting black-eyed, but we had just built bunkers down there costing twenty-one thousand dollars or thereabouts; the coal was getting a bad reputation, and I thought we had gone far enough. I had a meeting with Mr. Graham. I told him this thing was getting to such a point that we simply had to stop, and told him we had better get an engineer up there. I said: "You are not a mining engineer, and we don't know who these men are that you have employed under you." The result was that I got Mr. Chandler, after inquiring around San Francisco, to come up to look at the mine and come back and report to me what he thought about it. My recollection is that he came back and reported verbally that the mine was in such a bad condition—at that time there was only one mine, as I understand it No. 1. The expression "The Beaver Hill Coal Mine" really stands for two mines, No. 1 and No. 2. As I understand No. 1 was the one that Mr. Graham opened; afterwards we called the one Mr. Chandler worked No. 2. No. 1 was the mine that was shut down and No. 2 is the mine that Chandler continued to operate through the years. Mr. Chandler came down, and his report was so unfavorable, it just confirmed my fears, that the Beaver Hill proposition

was gone unless we did something strenuous about it, such as appointing new management and opening up more coal, if it was possible to do so; for that purpose he was sent up there, to find out whether anything could be done with the property. He came back and said No. 1 mine, the mine that was there then, was practically worthless. I think he told me that there could be more than about six or seven thousand tons recovered, but by robbing pillars and doing things of that kind, we might get a little more. I would not be positive about that. He made a written report. This is just the substance of what he said. I then told Graham I was going to send Mr. Chandler up. The first time Mr. Chandler went up Mr. Graham expected him. I presume Mr. Chandler went up the second time under my instruction; probably to get a further report under conditions I wanted to be sure about before making any change as manager. After Mr. Chandler came back the second time he told me about this bribe. I didn't pay much attention to that. In view of the fact of the enormous loss, as I considered it, that the whole property practically was worthless, you see, it seemed to me at that time, the thought of the bribe didn't cut much figure with me, or didn't influence me in any way. And furthermore, I was a little suspicious of Graham at that time, and believed it might be possible that he could have done it. In the meantime I had seen Mr. Graham and said: "Now, Mr. Graham, we have inquired all about Chandler, and we are going to make a change, and it is to your interest just as well as it is to ours, that there should be a change. You are only

in this railroad, you have everything at stake up here, and if we are willing to put up more money to try to pull this thing out, surely you ought to be perfectly willing to help us. He didn't like the idea of being put out as manager. That conversation was some time in November or December, 1897. Mr. Graham said that was all right. He would be perfectly satisfied, and go ahead and do what you like about it"—words to that effect; in other words, led me to believe he was perfectly willing that we should put somebody else in there who probably would do better than he could. I supposed my arguments with him at that time, that his interests were at stake just like ours, were potent, and he was perfectly willing to do it. The sequence of events will appear in the books and minutes of the Beaver Hill Coal Company, of which I was secretary at that time. I think it was in December that we appointed Mr. Chandler manager, and simultaneously removed Mr. Graham as manager. I recall the circumstance that Graham in June, 1898, filed a suit against the Beaver Hill Coal Company and had Hassett appointed receiver. I recollect that proceedings were at once taken to have the Court remove Hassett. Hassett was removed and Catlin was appointed receiver. I recall that in that proceeding affidavits were filed and charges of irregularity and misappropriation made against Mr. Graham as will appear more particularly from the affidavits which were read here the other day. I made an affidavit in that proceeding. I made the affidavit in good faith. The facts, so far as I knew at the time were truthfully stated by me in that affi-

davit. I did not make that affidavit with any intent to oppress Mr. Graham, nor with any intent or purpose except to conserve what I believed to be the right of the case. I did not nor did anybody connected with the Spreckels Company to my knowledge request any one to make any affidavit except for the purpose of presenting our rights in that case. I know Mr. Frank Powers and Mr. William Hamilton. Mr. Hamilton was a young attorney in San Francisco and a sort of accountant, I think. I didn't know very much about him except that he was recommended to us as being a young man who would be perfectly capable of investigating and experting accounts. He was sent up there to find out what he could about where our money was going to, to hunt up data for the purpose of finding out what Graham was doing with all this money we were sending up. I recall the first suit Graham brought against the Beaver Hill Coal Company. I recall the circumstance that affidavits were filed, in these various litigations. There was no affidavit ever made by me, in any litigation to which Graham was a party or in which he was interested as between my people and Graham in which I acted with any intent to oppress Graham. I never made any affidavit in respect to Graham in which I made any charge against him I did not fully believe in.

Q. Did you make any affidavit in any of these litigations in which any fact was stated which you did not know then at the time to be true, as you stated it?

A. Well, I might qualify that a little.

MR. McNAB: I suppose, if your Honor please, this is all subject to our objection?

PLAINTIFF'S EXCEPTION No. 13.

THE WITNESS: (continuing) After Mr. Graham had held the road for the six months that was stated—under the agreement during that six months, he was to keep the road, keep it up as a railroad; in other words, what revenue came in, he was to take care of the road, he was to pay the labor bills and all such things as that. After the six months were up, and he failed to pay the money, and these men came along and put him out, then we found there was a large amount of money necessary to pay the unpaid bills for supplies, labor and so on, that had accumulated against the road during these six months, where we believed Graham had just simply taken in everything and abandoned the road to us at the end of the six months' period. I believe to get a receiver appointed, which was Chandler, that we filed a complaint in which I alleged money had been taken from the railroad, and so on by R. A. Graham and associates. I believed that then, but I couldn't swear, as to specific items, except I knew in a general way that there had been fraudulent transactions, and we were sending up money. I think we sent up something like a hurry-up call of twenty-five thousand dollars right away; "the railroad men haven't been paid, and there are liens and suits threatened against the road." It is absolutely untrue that as Mr. Graham has testified in this case he had a conversation with me after this settlement was executed in

which he said to me that Preston was obstructing, or "knocking" or interfering with some effort upon his part to get the Southern Pacific or Huntington or George Crocker to take this railroad property and that I stated Preston would have to quit. I had some conversation with Mr. Graham in respect to Huntington and these bonds. Mr. Graham had projected a line of railroad all the way from Marshfield to Roseburg. We got into it by advancing him money; we had contracts to show just what should happen; we got as far as Myrtle Point; Mr. Graham urged us to go on to Roseburg; that was a distance of about sixty-seven miles; that would involve a sum of money running up in the million. We had had enough of it. We started in to sell a few rails and we found ourselves landed with several hundred thousand dollars, with no prospect of getting it out. These I identify as the profiles. Mr. Graham had the profiles and kept showing them to me, trying to induce us to go on. We had the bonds and were in the peculiar position that if we didn't sell the bonds we couldn't get our money back, because the road could not pay it; there could not be enough revenue from the road. The only way we could ever get out would be the sale of those bonds, then Graham would pay us that way. Mr. Graham told me that he had a conversation with C. P. Huntington, whereby Huntington had told him he would not furnish money to complete the road from Myrtle Point to Roseburg, but if the road was built out there, Huntington would buy it, rather than have a competitor, cutting in half way from Roseburg. I did not nor did anybody connected with

the J. D. Spreckels & Bros. Company to my knowledge ever instruct or authorize or request Mr. Preston after this settlement was made, or at any other time, to interfere with or "knock" Mr. Graham in any effort to get the railroad company to take over this Coos Bay property. We were praying that he would take it. That was the object of the agreement. We put the price down low just so that he would get it. At the time that this contract was negotiated and at the time that it was made Mr. Graham was in control of the Coos Bay, Roseburg & Eastern Railroad. He had control of the entire Board of Directors. I did not get a release from the Coos Bay, Roseburg & Eastern Railroad Company releasing Mr. Graham because they would not call a meeting. Under the agreement we were supposed to be put in control of the railroad—of the Board of Directors; as soon as we were placed in control of the Board of Directors; then we were to release Mr. Graham from any claim or demands of the Coos Bay road against him. We made numerous efforts to get Mr. Sheridan, the president, to call this meeting. We asked Mr. Hassett; we asked Mr. Graham. It was Mr. Graham's duty to do this because he had control. We expected that Mr. Graham would call the meeting to get himself released; we were depending on them to do it. They would not do it, and we never were put in as directors; we were never able to obtain this document to give to Mr. Graham. We applied to have the stock registered in our name as stockholders, did on the books of the company. We could not get that done. That is the explanation of

the suit which was brought in 1900 to compel the registration of the stock, the calling of a meeting and a proper election of directors. I can produce the minute book containing the resolution authorizing the Spreckels Company to execute the agreement of June 8, 1899.

(Witness produces minutes.)

(Counsel for defendant reads minutes of meeting at San Francisco, May 22, 1899, of the J. D. Spreckels & Bros. Company, at page 81 of the record book of the company, as follows:)

“ A special meeting of the Board of Directors.
“J. D. Spreckels & Bros. Co. was held at Company’s office, 327 Market St., 11:30 A. M., this
“date, pursuant to a call therefor, issued by the
“president, J. D. Spreckels, by personal notice
“served on each Director, as required by Article
“No. 7 of the By-Laws.

“ President J. D. Spreckels called the meeting
“to order. Those present were: J. D. Spreckels,
“A. B. Spreckels, F. S. Samuels, W. D. K. Gibson, C. A. Hug.

“ Mr. J. D. Spreckels then stated that the object of the meeting was to authorize the President and Secretary to execute a certain document
“in connection with the settlement of matters in
“dispute between the Beaver Hill Coal Co. and
“R. A. Graham. The following resolution was
“thereupon introduced and on motion of Mr. A.

“B. Spreckels, seconded by W. D. K. Gibson, was
“unanimously adopted:

“Whereas the matters of difference between R.
“A. Graham and this corporation, as between them-
“selves, and as between each, and the Beaver Hill
“Coal Co. having been settled and adjusted; and

“Whereas, an agreement has been made recit-
“ing the terms of said settlement, wherein and
“whereby both Graham and this corporation de-
“posit all of the stock and securities of the Coos
“Bay, Roseburg and Eastern Railroad and Nav-
“igation Company, also all of the stock of the
“Beaver Hill Coal Company, also certain deeds,
“releases and stipulations with a trustee, and by
“the general terms of which agreement all of the
“property forming the subject matter of the dis-
“pute between this corporation and said Graham
“is to be delivered to Graham any time within six
“months, upon the payment of the sum of Five hun-
“dred and fifty thousand dollars in United States
“gold coin \$550,000, and upon the failure of
“Graham to make such payment within such time,
“then the whole of such property to vest in and be-
“come the property of this corporation, being in-
“tended thereby to end all matters of difference.
“Now, therefore, it is hereby

“Resolved, That the President and Secretary
“of this corporation be and they are hereby author-
“ized to execute such agreement of settlement in
“the name of this corporation, and attach thereto

“the corporate seal, and that such discretion be
“vested in such officers as may enable them to
“execute said agreement.

“ There being no further business, on motion, the
“meeting adjourned.

“ CHAS. V. HUG,
“ Secretary.”

THE WITNESS: (continuing) Mr. Hug is dead. I recall the circumstance that in 1905 a letter signed by Mr. Graham was received by Mr. A. B. Spreckels from New York. I saw the original letter. I made a copy of it myself.

(Counsel for defendants shows witness letter marked: “Room 512, 52 Broadway, New York City. Wed., Feb. 8, 1905.” Marked: “Defendant’s Exhibit A.)

THE WITNESS: (continuing) Upon being shown this letter I state this is a correct copy of the original. All our records and papers were destroyed in the great fire of 1906. Mr. Preston died April 16, 1905; Mr. S. P. Smith upon August 16, 1907, and Mr. Charles A. Hug, May 21, 1909. We had some valuable office documents, such as titles and deeds in safe deposit which we saved. Papers, such as bills and letters and telegrams and ordinary contracts were destroyed.

Q. Well, how did you come to make a copy of that original letter, Mr. Samuels?

A. Well, because it contained—you mean this letter here?

Q. Yes.

A. Well, it had two documents in it that it was necessary to send immediately up to our attorney up here in Portland, Williams, Wood & Linthicum, so I had a copy made right away and sent up—sent up those documents—and then had the original letter in my files. So in 1905, I carried them in my files about ten or eleven months. In 1906 that letter went into ashes with the rest of our papers. I have a memorandum showing the amounts that the Spreckels Company put into this railroad business, and into this coal business, and what they got out of it from the Southern Pacific Company. At the time of the sale the steamer “Czarina” was \$120,649.70. The original cost of the steamer was \$50,000, and reconstruction with added improvements, brought it up to one hundred and twenty thousand. The “Breakwater” originally cost \$75,000, but really cost us one hundred and forty-three thousand. We bought her and reconstructed her. The Coos Bay Railroad itself stood us seven hundred and twenty-eight thousand, nine hundred and forty-seven dollars. The coal bunkers in San Francisco, that we had built down there for the purpose of storing the coal as it came down from Coos Bay, twenty-one thousand eight hundred and twenty dollars and thirty-two cents. In the Beaver Hill Coal Company, at the time of the sale to the Southern Pacific Company, we had nine hundred and thirty-one thousand, three hundred and ninety-one dollars. It says here: “Real estate, Marshfield, \$1,101.” I don’t know just what that was. So we had actually invested at the time of the sale to the South-

ern Pacific Railroad Company, \$1,947,350.20. We got one million dollars. We bid the nine hundred and fifty-nine thousand dollars good-bye. It might be that the Southern Pacific paid for all of these properties one million three hundred thousand. I don't know which is the fact that it is one million dollars or one million three hundred thousand dollars. As Mr. J. D. Spreckels in his testimony said, all we got was \$1,000,000. Mr. A. B. Spreckels gave an option to a man named Smith; he turned around and sold it to the Southern Pacific Company. I don't know the price he got for it. Mr. Spreckels was right when he said that the J. D. Spreckels & Bros. Company got out of it one million dollars. I recall the circumstance that I took possession of the railroad property, after the agreement of June 8, 1899, had been executed and in course of time, December, 1899, was reached. Mr. Chandler was up in Coos Bay at the time, and we were being advised of the condition of things; that the road was being allowed to run down; meantime there seemed to be no evidence that Graham was going to raise the five hundred and fifty thousand dollars to pay us; we were becoming a little worried about getting the railroad back in a dilapidated condition, covered with debt. As soon as the time expired I telegraphed to Chandler to take possession of the road; that that road was ours at the end of the six months' period; that the money had not been paid; that he should take possession of it to take care of the property. I told him to send to Portland to get help if necessary, but to get possession; that is how Chandler acted, on my authority, I think I was solely responsible

for that. I did not instruct Mr. Chandler at any time in connection with taking possession of the road to do anything oppressive or unnecessary in the way of harshness or severity to anybody. Mr. Graham was not there himself, and the road was in the hands of a lot of irresponsible people, people that we had charged with rascality of every kind; we were in a bad way. Acting for the stockholders I instructed him to take possession. Then we commenced a suit to have a receiver appointed as quick as we could. After December, 1899, after we had taken possession of the railroad property, we advanced more moneys to the railroad. I think that Chandler was receiver from the time he was first put in up to the time the Southern Pacific bought it; that would be from January or February, 1900, up to 1906, about five or six years.

MR. DUNNE: Q. Now, just tell his Honor what the fact is after the 8th of December, 1899, and after you took your possession of the railroad, tell the Court what further advances you made upon that property—how much more money you put into it?

MR. McNAB: Just a moment, Mr. Samuels. For the purpose of saving the point, in view of the fact that your Honor ruled on this on the demurrers to the answers, and ruled that it was not a proper counterclaim, I desire to interpose an objection on the ground that it is irrelevant, and immaterial; likewise incompetent.

THE COURT: Very well. You may answer. I did not know that I had ruled on that—did not recall

that I had ruled on any answer in this case. I did in the law case.

MR. HAMPSON: You did in the law case; not in this case.

THE COURT: All right. That was an action for conversion. This is one to redeem the property, isn't it?

MR. DUNNE: Yes.

THE COURT: The question here is, what can be charged up? It is for an accounting.

MR. McNAB: It is an amended complaint in the same action—accounting and general relief, your Honor.

PLAINTIFF'S EXCEPTION No. 14.

THE WITNESS: (continuing) At the time we had put this amount of money into the railroad, above the amount of money we actually had in at the time we took possession of it. At the time we took possession, we had five hundred and twenty-three thousand one hundred and sixty-two. After we took possession of the railroad in 1899 we put in further amounts of money to the sum of approximately two hundred thousand dollars, in the railroad itself. After the execution of the settlement of June 8, 1899, and the arrival of the date therein specified, December 8, 1899, and our taking possession of the railroad property, we put about three hundred thousand or more in the coal business. Our

figures show that the whole experience meant a loss to us of nearly a million dollars over and above what we got out of the deal with the Southern Pacific.

CROSS-EXAMINATION.

(By MR. McNAB:)

Mr Graham caused us to expend three hundred thousand dollars after he was out of the property in the Beaver Hill Company—no; I will qualify that by saying that had the No. 1 mine been properly worked by Graham, it would not have been lost; we would not have probably had to expend three hundred thousand dollars to open up a new mine. I never saw a coal mine before I saw that one. I do not know anything about coal mines. We never had anybody, as a so-called expert in that mine, except Chandler.

(An adjournment was here taken until Monday, April 24, 1916, at 10 A. M.)

MONDAY, APRIL 24, 1916, AT 10 A. M.

(Cross-examination of F. S. SAMUELS resumed.)

THE WITNESS: When Mr. Graham first gave us security for the rails which had been purchased, he gave us ten thousand and one shares of the Coos Bay Railway stock. I don't know as Spreckels Bros. & Company had put in five hundred thousand dollars, as I testified on direct-examination, when the railroad

was completed to Myrtle Point. I think we put some more money in after we got to Myrtle Point. I have no means of telling how much we put in up to Myrtle Point. I am not sure as to how much cash we had advanced when we took Mr. Graham's note, dated November 1, 1897. I am not sure on that. He still operated the road after that. Eventually we put in a great deal more money. I can't remember whether Spreckels Bros. & Company advanced one single dollar to Mr. Graham on account of that railroad, during his management, after the note of November 1, 1897. I have no books to show whether we did or not. I am testifying as to the amount of money from data given to me by our treasurer, Mr. Gibson. I could not say that I have accounts to show how much money we actually advanced to the railroad up to the making of the note of November 1, 1897. This note of five hundred and twenty-three thousand dollars was made up of supplies and material we furnished the road, and commissions. I suppose we were charging Mr. Graham six per cent for our advances to the railroad. I don't know whether of this note of five hundred and twenty-three thousand one hundred and sixty-two dollars and fifty-two cents only \$306,151.60 was cash advanced, and that all the rest were commissions which we had charged up to him for advancing the money and interest on the money, compound interest. There were certainly some commissions in there, but I don't know how much. I don't know that of this \$523,162.52 we had received \$217,010.52 as bonuses and interest. Those lump sums I testified to the other day were accurate which I have

given from the paper. I got these from Mr. Gibson. Mr. Gibson was the bookkeeper of the firm. It is quite possible that we received letters from Mr. Graham calling our attention to the fact that he had had to acquire certain rights of way beyond Myrtle Point on the way to Roseburg, and that we O K'd the letter and paid the bills. When we entered into this agreement to finance the building of this railroad, we thought we were being fairly treated with respect to commissions and interest. I don't remember whether under that agreement we were to get commissions at the rate of five per cent compounded quarterly on every dollar we advanced; and interest at the rate of seven per cent. I have no recollection that I sent word to Mr. Graham that I was going to have him sign a note on his arrival. I had been conferring with Mr. Preston, the attorney for the company, right along as to getting Mr. Graham to sign up this note. Our account was growing so big that it was becoming alarming. We had security in the way of ten thousand and one shares of stock and six hundred and twenty bonds of the railroad. We put into one note the ten thousand and one shares of the stock of the railroad and six hundred and twenty bonds and the Marshfield land. We had that as security for the account at that time. As to whether we contemplated that we would be done with all these contracts, they would be behind us, by which we had been financing the railroad, and whether we intended to finance the railroad any further, we didn't intend to finance the railroad beyond Myrtle Point, but we might have contemplated that more money would be required

to keep the railroad up. Naturally, we would have to take care of that, as being a security, we would have to advance money if it was necessary to keep the road in operation. The only security that we had against our note was the railroad, and it was incumbent on us to keep that railroad in some kind of shape, even if we had to put a lot more money up to do it. I was not present at the signing of the note of November first. Immediately after that note was signed I did not have called to my attention the fact that Mr. A. B. Spreckels had promised Mr. Graham \$65,000 further advances to the Beaver Hill. I did not go to Mr. A. B. Spreckels and find that he had agreed to advance to Mr. Graham, and advise him that he do nothing of the kind; I never did at any time. No—I am not satisfied that that is correct as to whether at any time I ever interfered with any arrangement by which Mr. Graham was to secure further advances from Mr. A. B. Spreckels. Mr. Graham after he came down we were beginning to find out that he was stealing our money—to speak plainly; that he would requisition on us for sums of money which he would divert for other purposes. After the note was signed, or before, Mr. Graham came to us with a proposition that he had made out by Mr. Deering that if we would give him—I think about seventy thousand dollars, and let him have the mine for one year, if he didn't make the mine pay he would step out. In other words, he wanted us to make him a present of \$72,000 or something like that, and turn over our property to him, and at the end of a year we would get back the shell, if we got back anything; that was

the proposition that came to me, and I flatly refused to have anything to do with it. Mr. Graham brought the proposition to me. It was about that time in 1897. I could not say where he talked to me about this. I don't think Mr. A. B. Spreckels was present with Mr. Graham and me. I will concede this: If he had taken that to Mr. Spreckels and Mr. Spreckels had spoken to me about it, I would have flatly objected—Mr. Spreckels could have done what he pleased, but I certainly would have flatly objected. If Mr. A. B. Spreckels had promised to advance sixty-five thousand dollars to Mr. Graham and had agreed to keep him in as manager for a year, you bet I would have killed it if I could. As a matter of fact I did kill such a contract, otherwise it would have been signed. I recall that that was in connection with the contract drawn by Mr. Deering. I was not present at any interview regarding this between Mr. A. B. Spreckels and Mr. Graham. I presume the conversation which I had with Mr. Graham was in the office. It is absolutely false that the first that I ever heard of that contract was when Mr. Graham met me on the street, and informed you that, in spite of my opposition, Mr. A. B. Spreckels was going to carry out his contract and advance sixty-five thousand dollars, and that Mr. Graham was to be permitted to manage it another year. That statement of Mr. Graham's is absolutely false from start to finish. But I am going to come back to a proposition where he did say something like that. The amount was ten thousand dollars, but it was long before that time. It was on Pine Street. I remember that very

distinctly, because he had come to us for more money, and I had refused to let him have it. He went up to the Palace Hotel. The next I heard of it was meeting him on Pine Street, and he said: "You are not—you don't control Spreckels," something to that effect, "I have got that money from him." I went right back to the office, and I think I spoke to Mr. Gibson about it. I said: "Mr. Spreckels has given him that money." I was thoroughly disgusted about it. I asked Mr. Spreckels that afternoon: "Did you give him any further advances?" He said he did. That was all there was to that. That hadn't any connection whatever with this matter of giving him a year to finish this up in, or more money, or anything of that kind. I first heard from Mr. Graham that he was to get this advance of sixty-five thousand and remain in possession of the mine. I don't recall where it was. I don't think it went as far as my going to Mr. A. B. Spreckels and saying: "Now, I object to your giving Mr. Graham sixty-five thousand dollars." I don't think that Spreckels knew anything about it. He could go to Mr. Spreckels or anybody else, without my knowing it. Mr. Graham was then receiving \$150 a month and receiving enough to pay the premium on his insurance policy. When we sent Mr. Chandler up the second time it was our intention that after we got his report about the condition of the mine, we were going to put him in as manager, or somebody else. I probably did write to Mr. Graham saying that the suggestion in regard to a mining superintendent was wholly based upon his health, because of the enormous amount of labor

he was doing for us. I was trying to keep peace with the man that had is in his fist. Graham had no contract with us by which he was to remain as manager of Beaver Hill Coal Company for any particular length of time. We were dissatisfied with Graham because we were not getting coal enough, but not for that reason alone. Personally I knew nothing about what was the proper thing in order to bring out more coal. I certainly did not order Mr. Graham to pull out coal out of the pillars if necessary to give you more coal. I would not say that I ordered Mr. Graham to take the men out of the gangways in order to send us more coal, but we naturally wanted all the coal we could get, and we were stimulating him to give it to us. It was up to him to give us all the coal he could with safety to the mine, with safety to the men, and under business conditions. I do not remember specifically whether I told him to take the men out of the gangways and put them in the rooms. I did not know what the consequences would be to the mine if they did. I just relied that he would not do anything that would not—he would not take the men out of the gangway or pull down pillars, and I didn't know what he would do. All we wanted was coal—something for our money. I don't recall having given him any specific instructions as to taking them out of the gangways and putting them into the rooms, and cutting on the pillars in order to get more coal. I don't think I would do it. It wouldn't be common sense, I don't think; because he was up there running it, and he would know how to get the coal out if it could be gotten out. Until there

was a surplus I recognized the Beaver Hill Coal Company mine as the sole and individual and exclusive property of our firm. I recognized that Mr. Graham had only possibly a future ownership in it if he should succeed in making the mine pay and there was a surplus, then he would get a half interest in it. Up to that time Mr. Graham hadn't any interest in it whatsoever. When this mine was turned over to the Southern Pacific I did regard it as worth something. We had already put a great deal of money in it, in new development work, and that development work was available to take coal out. A great deal of money has to be spent on a coal mine before you can take out any coal at all. You cannot take coal out as fast as you come to it. You have got to go away beyond and sink shafts and run drifts, and then commence at the ends and pull the coal out and let the mine cave in afterwards. Mr. Graham had an opportunity to give us a mine for about six hundred and fifty thousand dollars; and when we got through expending that, we hadn't anything—we had to keep begging him to give us some coal. All our money had not gone into the development work of the mine. We purchased air compressors from the Risdon Iron Works in San Francisco. I purchased stacks of things. When you are spending a big pile of money, you must send up a lot of supplies. We purchased and furnished and sent up rails for the track. The 130 houses for the miners he put on somebody else's property, and we had to buy them all back again. There seemed to be quite a bunch of houses. I was up there; but he described that as our

property, and I didn't know where the lines were; I didn't know anything about it while the houses were being built. I supposed it was right on our property. But Mr. McNab, in addition to these things that we bought and sent up, we also sent up money on requisitions, you know, cash. I expended either sixty, sixty-five or seventy thousand dollars in the first instance for the Norman contract. That subsequently was turned over by Mr. A. B. Spreckels to the Beaver Hill Coal Company for five hundred thousand dollars—the entire stock of the company. I don't remember suggesting the clearing up of land for the making of a town site. The \$10,000 I advanced on the Beaver Hill contract I guess was a necessary investment—that I guess was a necessary investment. Mr. Graham probably took Messrs. Myrick & Deering and had them prepare an ordinance for a municipal corporation so that he could control the liquor situation. It is quite likely I sent a bill from Myrick & Deering up to Mr. Graham for \$500 attorneys' fees for the preparing of those ordinances. It is quite likely Mr. Graham sent it back saying it was outrageous and \$250 was enough. I didn't know that these 130 houses came to \$52,000. I didn't know it was as bad as that. I didn't insure these houses for \$400 a house and take a commission to J. D. Spreckels & Bros. Company that I know of. I am not sure about that. I am not sure about anything. We were not in the fire insurance business, and not insurance brokers. We would attend to the insurance, but we didn't get anything out of it. I couldn't recall that it was \$400 a house. We had to bring miners out from

West Virginia, from Washington and other places. I am not sure whether we ourselves conducted the negotiations with the railroads for getting the rates on which to bring them out, or whether Mr. Graham did. We brought them out anyway. I advanced the money. I presume we submitted a great many bids from the various railroads, saying this and that railroad wanted to bid on it. We were acting on his advice at that time, with regard to the railroads. I did not select the railroad over which they were to be routed. We paid the bill. They were niggers. I don't know where they came from. They were experienced negro miners from West Virginia coal mines, with their families. We put up a hospital there for the care of the miners costing \$5,000. We agreed to the building of a school there that probably cost \$1,000. We certainly paid the bills, but the bills that we paid were not always what we ought to have paid. I don't know whether one dollar of that was not honestly expended on that school. As to whether J. D. Spreckels & Bros. Company puts in a gigantic investment like this without investigating where the money is going, we thought we were investigating. We were getting reports and accounts from them occasionally, and we could not—we had our suspicions about it. Our suspicions were not such as developed later. As to the \$1,000 expended on the school I didn't give it consideration and as to the \$5,000 for the hospital, I don't mean that one dollar of that money was misappropriated. We put up a store where we could sell the goods that were sent up. We did not supply a complete assortment of merchandise for it.

He bought it out of money—the larger part of that stock was bought from money furnished by us. He selected it and bought it. I don't believe a living man could tell you where it was purchased—vilest lot of junk that ever was put into a store. We discovered that shortly after it was there. But later on, when I went up there to make an investigation, after Chandler had been appointed manager, I went up there and I went all through the store, examined nearly everything in it. You bet it was terrible. Our purchasing agent was Hopki. He was in San Francisco. He may have purchased the stock but a very small proportion of it. He turned the bills in to me after purchasing this from wholesalers in San Francisco. I shipped them up on the steamer to Marshfield. I continued to purchase from time to time the requisitions sent down by Graham. I couldn't say there was \$15,000 of stock on hand when it was turned over by Mr. Graham to Mr. Chandler. My impression was that over two-thirds of the stock was absolutely worthless. For instance there was boxes upon boxes of Derby hats, old fashioned Derby hats for negro miners. I never saw them worn. If that stuff was purchased by Mr. Graham I don't know where he got it. We entrusted Mr. Hopkin to buy such stuff as he bought at the lowest price. I couldn't tell you what he purchased in that stock and what he did not. It was a very varied stock, for instance, canned goods and supplies of that kind, that would be bought in San Francisco, nails and wires, and things of that kind; blankets. I could not tell what was purchased in San Francisco and what

was not. Part of it was purchased in San Francisco by our purchasing agent, and the rest of it was purchased with money that he requisitioned for, and we didn't know how he spent that money. I couldn't tell where he purchased it. I think he spent some in Philadelphia. At least we got a bill later on from some firm in Philadelphia. I can't say whether I paid the bill. After Graham went out of the Beaver Hill Coal Company, he organized a company called the Beaver Coal Company, and we were charging him with buying stuff on the credit of the Beaver Hill Coal Company for the Beaver Coal Company, and the people that furnished it were confused in the names, and knowing that Graham had been manager for the Beaver Hill Coal Company, there was some stuff sent out from Philadelphia, and that is about the history of that. I couldn't prove that one thing that J. D. Spreckels & Bros. Company ever paid for, ever went into Mr. Graham's private account, over to the Klondike Mine. Whether it was proved against him in court at the time of the trial of the Beaver Hill Coal Company—we were proving these things then; we had all the proof then, and we have got some of it today. We will show it to you in a few minutes. I don't know whether all of the boots and shoes and all the leather equipment in that store came out of Murphy, Grant & Company's, or Buckingham & Hecht or Murphy, Grant & Company at San Francisco. I had a great deal to do besides going out and buying all these supplies. We had a buyer to do that. We had a purchasing agent named Hopki. I presume he purchased them. I guess that

insurance was placed by J. D. Spreckels & Bros. Company. I don't know whether we had stables and cattle and mules there to the extent of \$2,000; we had mules but I don't know that we had any cattle. I bought the horses and mules myself and shipped them up there; I don't know how many. I don't remember how much I paid for them. I couldn't recall how much I spent for them. I probably expended at the Risdon Iron Works for boilers and hoisting machinery and air compressors \$14,000. The J. D. Spreckels & Bros. Company would buy them. Graham did not buy them but he could tell us what he wanted. I went with the purchasing agent and did the buying, and attended to the shipping of it to Marshfield. Mr. Graham attended to getting out to the mine. That was one of my permanent investments there. We purchased pumps, I guess. Possibly we purchased two costing \$1200. If we purchased that it was shipped to Marshfield. We purchased rails; I couldn't tell you how many tons. Possibly 140 tons at \$30 a ton, making \$4200. That was purchased by J. D. Spreckels & Bros. Company in San Francisco, I guess. As to that being a necessary expenditure, why you could not open a mine without providing homes for people to live in, without providing tracks to run the coal out on, and without having mules to draw the cars. You could not operate a place there without a hospital. You ought to have a school, you ought to have a store—it is an out-of-the-way place. Why, what do you want? That is part of the whole game. I know what you are trying to get at, and I will save you a lot of trouble by telling you

right off about a whole lot of those things. I probably spent \$5000 for an air compressor. I selected that and sent it up. I think we had a diamond drill equipment. That cost \$7,000. I did not select it. It was bought, I think, on account of Mr. Graham. I think he wanted it. Possible that is the diamond drill I sent up to Mr. Chandler to watch while it was in operation, to see whether or not they could discover other ledges of coal. It is not my recollection that when I sent Mr. Chandler on the second occasion I sent him with a notice to Mr. Graham that the purpose of Mr. Chandler was to watch the operations of the diamond drill in investigating these respective claims running along the ledge from the Beaver Hill Coal Company's mine into the lands that Mr. Graham thought we ought to develop. All I can recollect about that is, that Mr. Graham suggested at that time—it is a little hazy to me where that came from, but now that you recall it, on the second trip of Mr. Chandler I think he was instructed to look at this—watch this bore hole, or something. I don't know much about that. I couldn't recall that that was the only reason I gave Mr. Graham for sending Chandler up. Did I give him any reason for it? I certainly will tell you what it was. It might be possible that at the moment I sent Mr. Chandler up to watch the operations of the diamond drill I was contemplating supplanting Mr. Graham in the management by appointing Mr. Chandler.

Q. I show you a letter purporting to be in your own handwriting, and ask you whether that is your letter?

A. What is that to this? Do you want me to read it?

Q. I will show it to counsel. (Hands letter to counsel.)

Mr. Samuels, before it escapes my mind, I want to ask you something. Prior to the execution of the note of November 1, 1897, as interest accrued on the open account, you simply put it on the account against Graham, didn't you? You didn't collect it?

THE WITNESS: No, we put it—I think we put it against the account. I didn't do that myself. I didn't collect interest from Mr. Graham. I think I simply charged it up against his account. From the time we secured that note for \$523,000 we collected the interest monthly, I think. I don't know why I didn't sue him before I got the note in which I had placed this clause regarding interest payable monthly. We didn't commence to sue him until after he stopped paying interest on the note. I don't think he was paying interest at that time except as it was charged against him on the open account. I think it was charged right on the open account. When he had become 60 days in default on a disputed payment of interest on the note, I launched suit against him for the foreclosure of these securities, after 60 days. We could have done it within 30 days. We had a reason for doing it then. At this time Mr. Graham had a dispute with me as to whether or not there was a credit in our hands for logs shipped to the Spreckels Bros. Commercial Company. We had collected that money from the Spreckels Bros. Commercial

Company, and would not pay it to him on his note. We did not subsequently admit that he was entitled to it. We told him there was no money due him. I certainly wish to state that he was not entitled to the proceeds that had come into our hands from the Spreckels Commercial Company on those logs, because those logs belonged to us. We paid for sawing them. We hadn't proof at that time that those logs came off the Beaver Hill Coal Company's lands, but we had a strong suspicion that they had. They came out of the Beaver Hill Coal Company's boom. I don't know that those logs had been individually purchased by Mr. Graham with his own funds up the river and put into the boom and marked with a separate mark. He requisitioned on us to cut the logs for the Spreckels Commercial Company shipment; also for the labor attached to that, which he paid Seeley for cutting our logs. He would charge us for cutting the logs, charge us for sawing them up; then he would sell them back to us; and that is what accounted for what he sold to this Spreckels Brothers in San Diego; we had this item in his requisition account, requisitioned from him. I cannot say that I saw the logs. I don't know whether there was any white cedar on the Beaver Hill coal lands or not. There was a small schooner load of those logs; I think there was about six thousand dollars coming for it; our firm got the money. Some logs were turned over in a boom by Mr. Graham; I don't think he turned over to us \$22,000 worth. When we took possession, we took possession of what logs were there. I don't know whether Mr. Graham turned over to us after his discharge as manager to the Beaver Hill

Coal Company \$22,000 worth of logs. I don't know about the purchase of 225 coal cars; we may have purchased the iron for the coal cars and then probably the wood work was made at the mine. We certainly purchased coal cars or irons for coal cars, but I don't remember the price. That went into the general fund that was expended at the mine. We purchased some screens and elevators; I don't know whether \$5,000 is the amount or not; we expended and purchased \$5,000 worth of Pittsburgh washers and sent them up to Graham; I don't know what they cost. I acknowledge that the cost for the transportation of the miners to the mine was a legitimate expenditure. I could not tell whether it cost John D. Spreckels & Brothers Company \$15,000 to bring the miners out from the east. I had to look after them when they came out. They were in charge of some party. J. D. Spreckels & Brothers Company knew the miners were coming and footed the bills. I don't know whether Mr. Graham delivered over with the mine to Mr. Chandler two hundred negro miners with their families. I don't know whether during the time they were there, under charge of Mr. Graham, that there were 200 of them and their families and he so managed them there never was one case of disorder save one. We might have expended money for a pump down the slough, for all I know.

MR. McNAB: Q. Now, then, Mr. Samuels, you are repeatedly saying that probably it didn't cost any more. Do you mean to tell this Court that Mr. Graham got one dollar of the money you put up for water works?

A. Well, you pin me down to water works, but if you will make it requisition——

Q. Just a minute. I asked the question and I wish a categorical answer.

A. I say no to that, of course.

Q. Why, then, Mr. Samuels, in good faith, why if you don't know that Mr. Graham appropriated one dollar that was put in the water works, did you say to this Court that probably it was misappropriated?

A. Well, you asked me if they put up—in other words you are trying to infer these water works cost \$25,000. I don't believe they did cost \$25,000. You are asking me to state definitely they did cost it, and I don't do so. I don't believe the water works cost \$25,000. J. D. Spreckels & Brothers Company did not employ me to expend large sums of money without knowing whether they were expended for what we received or not. I probably was up there four or five times.

Mr. Graham took me all over the property and had me inspect it, in a perfunctory way. It is quite likely that I came back from this perfunctory walk, as I describe it, to the mine and said Mr. Graham nearly killed me walking me to death asking me to look at things. As to whether I sat down at the mouth of the mine and spent the rest of the day discussing the Corbett-Fitzsimmons fight, I was quite interested. I could not go over the whole acreage, but I saw coal coming out of the mouth of the mine and went in and saw them digging it down, taking it out and washing it, putting it in the cars and hauling it away. I went into No. 1 mine. The

books were always open to our firm's inspections and monthly accounts were sent down to us; I won't say monthly accounts, but we did get accounts. When we received these accounts we did not charge Mr. Graham with misspending the funds; we suspected it. I could not tell you when we first suspected it; it was pretty well along when mine No. 1 was being opened and we weren't getting any coal out of it. I do not mean to say that Mr. Graham kept the books in his own hands; they were under his control. We finally sent up Mr. Chandler, Mr. Powers and Mr. Hamilton to make an investigation for us. I am not sure about the date that Mr. Frank Powers or Mr. Hamilton were sent up. I don't think we did send anybody to look at the books of the Beaver Hill Coal Company until after Mr. Chandler had supplanted Mr. Graham in the management. When we first sent Mr. Chandler up to the mine we did suspect that things were going wrong; if I didn't, I would not have sent him up. When I sent Mr. Chandler up I expected to get control of the property and books so we could get a chance to expert them; that was one thing I had in view. We did not suggest to Mr. Graham prior to his removal we wanted to expert the books. He was manager of the mine; he had control; we hadn't anybody there to represent us, to expert his books or to do anything for our protection at all. The reason we could not fire him then instead of firing him in February was because we hadn't anybody that we knew that we wanted to send up until after I had made inquiries. As a matter of fact there wasn't one thing in the world to prevent our discharging Mr. Graham at any moment's

notice then from the Beaver Hill Coal Company. There was a complex situation there. Graham controlled the railroad. The Beaver Hill coal mine couldn't exist without a railroad, and if there had been an open rupture with Mr. Graham and he shut down on the transportation end of it, we would have had to stop the coal mining feature of it; everything was so interwoven with Graham that we were entirely at a loss how to act; I thought the best way out of it was to talk with Mr. Graham and to tell him about the necessity of making a change up there on account of the amount of money that we were putting into the mine and not getting any coal out of it.

Mr. Graham admitted that the change was necessary——

Q. Now, just a moment, Mr. Samuels. When did he ever admit to you a change was necessary? Now, give us the time and place.

A. Oh, I couldn't give you the time.

Q. You can't. Can you state a single place where a single conversation ever took place with Mr. Graham in which he said that a change was necessary. State the time and place.

A. Well, I wouldn't—the place was San Francisco, but I couldn't say the time nor the hour nor anything about it.

Q. Where was it?

A. Well, it would probably be in our office.

Q. Oh, probably; now, I am asking you not for probabilities, but for facts. Was it and, if so, when and where?

A. Well, I don't know when and where, but I am positive about the statement that I made previously, that I had talked with him about it. I don't know that it is a fact that the only letter our firm ever received from Mr. Graham relative to surrendering the management was the letter which was introduced in evidence written from Marshfield in response to my wire sent him while he was on the high seas, in which I informed him that he was wanted at once in San Francisco, after the signing of the note of November 1, 1897. This note for \$523,000 was drawn by E. B. Preston; he was not particularly bitter at Mr. Graham at the time of signing that note; he became very bitter afterwards. He had nothing to be particularly bitter about; in fact, I don't know that he knew much about Mr. Graham at that time. In the making of the agreement of June 8, 1899, he was threatening Mr. Graham that he would send him to jail on two or three criminal charges; we were expecting he would. I don't know whether he was threatening him or not. We were discussing among ourselves the prosecution of Mr. Graham. We discussed it after we got possession of the books and vouchers, constantly; and we were threatening him with embezzlement and with perjury; and with other crimes; everything up from larceny; it might have included larceny; it did include embezzlement and included perjury. The two suits were going on about the same time, one for the foreclosure of the note and the other on the charge of embezzlement; it was while we were engaged in the trial of the suit for foreclosure and were confronting Mr. Graham with all this evidence that we had accumulated where we showed

that he had cut logs off our land; that he had sent to the sawmill, charged us with the freight on the railroad, charged us with the cost of sawing the logs up and then sold them back to us and got our money for our own property. We had evidence of stuffed payrolls and fraudulent transactions where money had been switched from one account. It was while this trial was going on we were presenting him with evidence over his own signature, then it was that the proposal came from his side to call this off and call everything off by giving him an option to buy all this property back—give him six months option to buy all this property back. My impression was there were two suits about the same time, one for foreclosure and the other for the accounting. Mr. Preston was hurling charges at Mr. Graham on the witness stand. We charged him in another case with a hundred thousand embezzlement. It was written up in the San Francisco "Bulletin." I was not on the stand in that case. Going back to this note of November 1, 1897, we were to get, under the contract, a ten per cent commission for the sale of the bonds. The bonds were in our possession as security, and if the bonds were sold and Graham constructed the road and we got enough money from the sale of the bonds to construct the road, we were to get ten per cent for the sale of the bonds. There was a subsequent contract reducing it to six per cent because Mr. Graham claimed our charges were too high. Some English bankers, Sperling & Company, sent their experts out with a view of seeing if they would buy these bonds. They said the bonds wouldn't suit the English investors because they bore six per cent; they

might take them at five. I had telegraphic communications relative to getting the engineer of the Canadian Pacific. I had telegraph communication with Horn Payne of the firm, myself, and reported to Mr. Graham I was dickering to get the charges down because I thought they were too high. It is a fact that all negotiations for the sales of the bonds were to be conducted through J. D. Spreckels & Bros. Company, and we were to get ten per cent of the commissions on the sales, and ten per cent on the profits of the road to Roseburg. When I was conducting these negotiations with Horn Payne for the sale of the bonds, we then had a contract with Mr. Graham by which all negotiations were to be conducted through us and we were to get ten per cent on the sale of the bonds. It may be possible that we did send Mr. Graham to England. I know of Horn Payne coming out as representative of Sperling & Company, bankers in London. We had negotiations by which we were to pay the engineer of the Canadian Pacific Railroad \$100 a day from the time he left Montreal. I think there were some negotiations between ourselves and Horn Payne, who was the financial man, about getting an engineer who would be satisfactory to them; these negotiations were conducted by me, I think. I guess we paid \$5,000 for getting that report. I don't think there ever was any subsequent contract prior to the note of November 1, 1897. At that time we had all of these securities in our possession. I could not tell you whether we expended one dollar on that railroad after the note of November 1, 1897, and while Mr. Graham was manager. It is a fact that Horn Payne said

he wouldn't take the bonds until we completed the road through to Roseburg. It is also a fact we would not put up the money to complete it through to Roseburg. We did not put up any more money after we got to Myrtle Point. We were still to have our contract open by which we were empowered absolutely to negotiate for the bonds; we were always consulting Mr. Graham about it, and Mr. Graham was looking after his own interests; and, of course, we were looking after ours. On being shown the accounts entitled: "In account with R. A. Graham" — "In account with J. D. Spreckels & Brothers Company," it seems you have everything; it is on our ledger. The total balance is \$329,105.00. I will not say now that on this account for \$523,000 that \$217,010.52 went to us for bonuses and interest. I am positive that if Mr. A. B. Spreckels brought any proceeding to me regarding his making certain advances which Mr. Spreckels had agreed to advance to Mr. Graham, that I absolutely stopped him in making the advances. I think there was some seventy thousand dollars. I think it was in conjunction with the desire on the part of Mr. Graham to be permitted to remain another year in the Beaver Hill management. I cannot fix the date, but I tell you that I killed it with Graham and that if Mr. Spreckels brought it up to me I certainly would have killed it with him, if I could. I think that it was in connection with a contract drawn by Mr. Deering. I had lost faith in Graham at this time. After Mr. Graham went out we put in Mr. Chandler. I presume I approved every good recommendation Mr. Chandler made. We cut his salary down during the

Hassett receivership and Catlin receivership. We did not care what Mr. Chandler was doing up there while we were paying him \$4,000 a year; because we had to have an engineer. We didn't know how soon we would come into possession of the property. He was acquainted with the situation. The receiver was in possession then. We were in possession when we first sent Mr. Chandler there at a salary of \$4,000. I think after he went up the mine paid operating expenses. We put three hundred thousand dollars into this mine No. 2 after Mr. Chandler went up there. Mr. Graham shipped us ninety-three thousand tons of coal; allow ninety-five thousand tons from September, 1894.

(Witness excused.)

(A recess was here taken until 2 P. M.)

MONDAY, APRIL 24, 1916, AT 2 P. M.

FRANK H. POWERS, a witness called on behalf of the defendant, being first duly sworn, testified as follows on

DIRECT EXAMINATION.

(By MR. DUNNE:)

I am a member of the law firm of Heller, Powers & Ehrman, of San Francisco. I made an affidavit on the 17th of June, 1898, in the case of R. A. Graham against the Beaver Hill Coal Company, A. B. Spreckels, et al. The circumstances of my making it were that

Colonel Preston, who was senior counsel for Spreckels & Bros. Company had employed the firm of Heller & Powers to act as counsel with him; that in the January preceding the making of this affidavit I had gone to Marshfield for the purpose of obtaining possession of the books and papers and general records of the Beaver Hill Coal Company from the Graham regime to turn it over to the Chandler regime; subsequently, probably in June, 1898, a suit had been commenced whereby on an ex parte order Mr. Hassett had been appointed receiver with omnibus authority; after discussion, we determined that it was unfair for him to have authority other than to hold the property in the condition in which it was at the time he took possession; and in order to obtain an order modifying the original order appointing him receiver, curtailing his authority down to that of holding possession in the condition in which it was until the matter could be heard upon its merits, that affidavit was prepared. Mr. Hamilton was to act as expert and I to act as attorney, called on Mr. Hassett as a representative of Mr. Graham, Mr. Graham was not then present in Marshfield, and Mr. Hamilton was started to expert the books in order to check over the facts. Mr. Hassett at the time explained that they had expended a large sum of money, in the neighborhood of one million two hundred thousand dollars, and that he did not wish to turn over the books until he had everything properly entered up; after a few days I had an interview with Mr. Hassett asking for explanations concerning certain items that seemed improper and unfair. One was the matter of six million feet of logs; the other was a matter

of taking down certain money for the purpose of paying life insurance, and another was for drawing down one thousand dollars to pay Myrick & Deering, apparently for services to be performed for Mr. Graham in order to antagonize the work that I was then doing; another was an attempt to have us accept a note of Mr. Graham's in place of cash that apparently should have been shown, a note of somewhere in the neighborhood of eleven thousand dollars; also that Mr. Hassett was charging Mr. Hassett's salary, half to Graham and half to the Beaver Hill Coal Company; I couldn't see where he performed any services for Beaver Hill Coal Company, and asked for an explanation of it; and in that explanation Hassett made such statements as appeared to me to make it impossible for him to be a fair receiver. That affidavit was made in order to bring the facts to the attention of the court so the court could decide whether or not it was advisable to modify the omnibus order which gave Mr. Hassett not only the right of receiver to take possession, but also to operate the mine. As to the logs Mr. Hassett asked for a credit of thirty thousand dollars. Apparently from the figures that Mr. Hamilton had given me, these logs had only cost in the neighborhood of two dollars or two and a half, and he was apparently getting for Mr. Graham individually a profit of two or three dollars a thousand. I objected to the item of thirty thousand dollars; and he tried to explain that to me, but couldn't. There appeared a discrepancy of some five or six hundred thousand feet of logs, which he explained had been shipped to one of the Spreckels dependencies at San Diego; there was a controversy as

to whether they belonged to Graham or to him; apparently from what the experts had given there was a shortage of some six hundred thousand feet. He was going to withhold a certain amount of money to pay a premium on life insurance that had not yet come due; and also in this note there was an item of four thousand dollars for some future money to be paid. The idea of taking cash out of the Beaver Hill Coal Company and accepting Mr. Graham's note in order to anticipate certain future payments was impossible for me to understand, and I refused to accept it otherwise than it was an improper action on the part of Mr. Hassett, and indicated that Mr. Hassett was not a man of the frame of mind who could act as receiver. I never had any instructions from anybody connected with the Spreckels Company, or with Mr. Preston, or from any source to do anything up there that was oppressive or prejudicial to Mr. Graham. My instructions were simply to obtain for Mr. Chandler such books and papers as he was entitled to, by virtue of his position. In making my affidavit I did not have any intent or purpose to injure or oppress Mr. Graham wrongfully. The facts stated in it were true as I understood them and expressed them.

CROSS EXAMINATION.

(By MR. McNAB:)

I am not an expert accountant, but I have had a very broad experience in cases turning upon matters of accounts. I have been outside attorney for the Board of Trade; probably handled as much as \$400,000 worth of business in a year at various times. Mr. Hamilton

experted the books; if there were any improper entries he was to find them. All I was attempting to do was to get for Mr. Graham's successor whatever property, books, assets and accounts Mr. Chandler as his successor was entitled to. Mr. Hamilton was acting primarily under the instructions of Mr. Preston, but with my counsel, under my instructions through Mr. Preston. I was present at Marshfield directing Mr. Hamilton's endeavors. My instructions were to report to me exactly what the facts were, and if anything looked suspicious to immediately investigate the details; I assumed he would pass over the thousand and one details that did not attract his attention, showing any good management. I did not go for the removal of Hassett. I went up in January for the purpose of installing Mr. Chandler fully as manager of the Beaver Hill Coal Company. I subsequently went up to Marshfield in June to demand the transfer of the stock of the Coos Bay Railway, which was held by J. D. Spreckels & Brothers Company in pledge. If Mr. Graham says he told me he was willing to wire to his attorney Mr. Deering, but that he would inform me then no matter what Mr. Deering informed him, as to our rights, that he would not change it, I would not say that he did not tell me that. I have not a distinct memory of that. I will not say that it did not occur that the following day Mr. Graham exhibited to me a telegram from Mr. Deering, saying that on the authority of Spreckels against the Nevada National Bank, that a pledgee did not have the authority to compel the transfer of the stock to his name, and he merely held it as a pledgee. It might have occurred. Mr. Gra-

ham would not transfer the stock. Of my own knowledge I do not know who those logs belonged to.

(The witness excused)

W. D. K. GIBSON, a witness called on behalf of the defendants, being first duly sworn, testified as follows on

DIRECT EXAMINATION.

(By MR. DUNNE:)

I have been treasurer of the J. D. Spreckels & Brothers Company; I am secretary at the present time. I have been connected with the company 35 years. During the time when these transactions with Graham were going on in 1897 and prior thereto, down to and including 1898 I was treasurer. I recall the figures as to the amount of money invested in the coal business and railroads given by Mr. Samuels in his testimony; those were substantially correct. I never gave any instructions in relation to any transactions with Graham that anything should be done in any way to oppress him or take unfair advantage of him. In my affidavits I made in the litigations I did not make those affidavits with any intent or purpose to oppress Graham or take any unfair advantage of him. The facts stated in that affidavit are truthfully stated, as I understood them when the affidavit was made. I recall that in April or May, 1897, Mr. Graham called at the office and went into the private office of Mr. Samuels and I was requested by Mr. Samuels to come in there and hear the

conversation. Mr. Graham had come down from the mine. After a general discussion on the topics, Mr. Samuels said to Mr. Graham: "All of the accounts and this estimate show that we are mining coal at a loss. Is there any hope whatever that we can mine at a profit?" Mr. Graham replied: "No, not until we sink a new shaft"; "not unless we sink a new shaft," or something to that effect. The conversation terminated at that.

CROSS EXAMINATION.

(By MR. McNAB:)

When I testified on direct examination that Mr. Samuels figures were substantially correct, I was alluding to the figures that Mr. Samuels stated the other day giving the costs of the various investments and the final amount charged to profit and loss. I was familiar with the accounting in 1897. Upon being shown this paper I state that they are accounts which were sent out by the J. D. Spreckels & Brothers Company as to the account of Mr. Graham. I see that on September 30, 1893, there is a certain balance struck here, and a new account opened. Possibly it was September, 1893, that the railroad had been completed to Myrtle Point. According to the statement, September 30, 1893, the balance was \$260,644.52. Turning to the account of November 4, 1897, that being on or about the date of the actual execution of the note by Mr. Graham for five hundred and twenty-three thousand dollars, the account shows that there had been advanced altogether \$523,162.52. At that time according to these statements we were charging Mr. Graham on that account as a commission

for moneys which we advanced five per cent. We adjust statements quarterly. From that account when we advanced certain moneys, we did insert the amount of money which was advanced to Mr. Graham, and on the same day, or at the end of the quarter, added to it the amount of the commission which we had charged for making that same advance. The interest was compounded quarterly. This computation from the face of the account that of the \$523,162, which was the last item, and which went into the promissory note of November 1st, only \$306,151.06 was for cash advances, and the rest was all for commissions and interest compounded quarterly, is correct.

(Counsel for plaintiff offers the account in evidence, which is admitted by the Court, and marked "Complainant's Exhibit No. 46.")

(Witness excused.)

EVERETT MINGUS, a witness called on behalf of the defendant, being first duly sworn, testified as follows on

DIRECT EXAMINATION.

(By MR. DUNNE:)

Between 1899 and 1903 I was a practicing physician at Marshfield, part of that time I was with the Beaver Hill Coal Company, part of the time with J. D. Spreckels & Bros. Company, and some of the time acted as physician for both the railroad and the Spreckels Com-

pany and Beaver Hill. I was there when Mr. Chandler took possession of the railway offices. Mr. Chandler said that he had received word from the J. D. Spreckels & Bros. Company to take possession of the railroad; he showed me a telegram to that effect; he asked me if I would like to go along. I told him I would. I went down there with Mr. Chandler, and the sheriff of Coos County—W. W. Gage at that time—John S. Coke, attorney, and there were two Thiel detectives, went as far as the depot. Mr. Coke and Mr. Gage stayed on the outside of the building while Mr. Chandler and two of these Thiel detectives went inside. We entered the office door, and Mr. Hassett was standing on the inside of the railing. Mr. Chandler told him he came down to take possession of the railroad for J. D. Spreckels & Bros. Company. Mr. Hassett made some dissenting remark. Mr. Chandler replied and said: "I am going to take it right now"; went inside of the flap door. The two Thiel detectives followed him. There was some altercation, wordy altercation between Mr. Chandler and Mr. Hassett at that time, which lasted probably ten minutes. There were no arms displayed by anybody. It was not a military performance. In the course of my residence and profession there I was in the office of the company very frequently, practically daily. I don't recall any notice being posted up on the building which were clippings from the San Francisco "Bulletin," touching a suit against Graham, in which he was charged with embezzlements, and being pasted on the windows of the office.

(No cross examination; witness excused.)

WM. H. HAMILTON, a witness called on behalf of the defendants, being first duly sworn, testified as follows on

DIRECT EXAMINATION.

(By MR. DUNNE:)

I am a lawyer by profession, living in San Francisco. I was in San Francisco in the years 1897, 1898 and 1899. At those times I was connected with the office of Colonel E. F. Preston. I went to Marshfield because Mr. Preston told me that the J. D. Spreckels & Bros. Company had invested some money in a venture in Coos Bay, Oregon, and that they were not satisfied that the funds they were sending up there were being applied as they should be. He asked me if I would be willing to go up there and make an investigation for them. Mr. Samuels, Mr. Preston and myself talked the matter over. Mr. Samuels said that they were requisitioned for sums of money by the Beaver Hill Company, that they wanted me to investigate and find out whether the funds requisitioned for were properly applied. I went up with Mr. Powers and went to the office of the Beaver Hill Coal Company with Mr. Powers and Mr. Chandler. The request was made that the Beaver Hill books be turned over. Mr. Hassett said he wanted to fix up some balances and so on, before he turned the books over. Meanwhile he arranged for me to have access to them. I examined the various items that were requisitioned, and found that a good many of the items, the requisitions that called for specific amounts for specific purposes, I found that the moneys sent up were not applied to those

purposes in all cases, and made my report accordingly to the office below. For instance, there would be a requisition which would state, to pay for horses, to pay so and so for sawing and logging—specific amounts. I would take the book and in one case there was a requisition for six hundred dollars to pay for the sawing of a cargo of lumber to be delivered to Spreckels Bros. Commercial Company of San Diego. That particular item there was nothing to show in the books of the Beaver Hill Coal Company that anything had ever been spent or paid for that item or purpose; there was no voucher for it whatever. There were other instances, a number of amounts that were never applied; I mean specific amounts requisitioned for that were never applied for the purpose for which they were requisitioned; that is, there was nothing on the Beaver Hill books or the vouchers, to show that money had ever been expended for those purposes.

At the close the bank accounts were in a very peculiar condition. In Marshfield there were three accounts standing in the name of J. B. Hassett, called "J. B. Hassett No. 1," "J. B. Hassett No. 2," and "J. B. Hassett No. 3." J. B. Hassett Account No. 1, I believe was either a Graham individual account, and Hassett No. 2 was Beaver Hill Company account, and Hassett No. 3, say, was the railroad account. Beaver Hill, apparently had an account with the National Bank of Roseburg. In December, 1897, the Beaver Hill Coal Company's books showed an amount something like fourteen hundred and odd dollars cash in the Roseburg Bank. The statement of the bank showed an overdraft in a very considerable amount instead of any cash on

hand, an overdraft I think somewhere in the neighborhood of twenty-eight thousand dollars; and in January, 1898, that overdraft was apparently covered, according to the bank's statements which I investigated, by a deposit by R. A. Graham, or some arrangement he made with the bank. There was a voucher made out for Myrick & Deering, and upon investigation Mr. Hassett afterwards admitted that that account was erroneously in Beaver Hill books, and didn't belong there; it was an R. A. Graham account. I think there was an eleven thousand dollar note of R. A. Graham offered to offset the cash which was unaccounted for. It was offered to Mr. Chandler, and under the advice of Mr. Powers, who was at Marshfield at the time, Mr. Chandler refused to accept it. I afterwards made an affidavit based upon my investigation. I was never instructed by anybody at any time in connection with this whole Graham business to do anything that was oppressive or prejudicial to Mr. Graham. My sole instructions were to go up and find out the true state of facts with relation to the accounts; simply, to trace so far as I could, whether the amounts requisitioned for had been applied for the purposes for which they were requisitioned, and generally to investigate the accounts there as to their correctness. When I made my affidavit I made it with the intention only of revealing what my investigation up there had shown. It expressed what my investigation had shown, as I understood it. The facts therein stated were true, as I understood them at the time.

CROSS EXAMINATION.

(By MR. McNAB:)

There were some specific amounts that were not accounted for. I do not know what they were spent for, except I know they were not spent for the purposes for which they were requisitioned; the books showed that quite a little money had been sent up there and was not accounted for. I examined the books after Mr. Hassett had turned them over. A man by the name of DeNevue, a man by the name of Simpson and Mr. Hassett were the bookkeepers. I recall Mr. Marsden who was one of the bookkeepers. He is now assistant manager of the Crane Company in this city. Whatever Mr. Hassett wanted me to see, he allowed me to see, saying that those were the Beaver Hill accounts; but if I desired to trace any particular item through its vouchers or bills, through other accounts which were in the office, I was very often put off with the explanation that those were Mr. Graham's private affairs, and I could not have access to them. I was never allowed to look at any of the correspondence of the Beaver Hill Coal Company, nor to trace items. I was an expert accountant at that time. I did not go over all those thousands of vouchers and strike a balance, but I examined every voucher there and every bill there. I did not make a full experting of the books. As I understand it, these three accounts in the bank, one account stood good for the other. If there was an overdraft in one account, why, practically all the money was deposited from the requisitions sent up by Spreckels Bros. & Company; my understanding was that the arrangement with

the bank was that any one account would stand good for the overdrafts of any of the others; so that very often there was an overdraft in the R. A. Graham account, and the railroad account for which the Beaver Hill account had to stand good. That overdraft was subsequently made good in the Roseburg National Bank that I spoke of. The accounts which I am talking about being intermingled were the accounts in the Marshfield bank. I don't know anything about what the arrangement was with the account in the Roseburg National Bank; that was the Beaver Hill account in the Roseburg National Bank; the Beaver Hill account showed a balance on hand of something over fourteen hundred dollars when Mr. Hassett turned over the books, and the bank's statement subsequently rendered at my request showed an overdraft of some twenty-eight thousand dollars. I don't recall the exact amount. In January the overdraft was made good, either by deposit by Mr. Graham or some arrangement he made with the bank, and their next statement showed that the overdraft was correct.

(Witness excused.)

HERBERT LOCKHART, a witness called on behalf of the defendants, being first duly sworn, testified as follows on

DIRECT EXAMINATION

(By MR. DUNNE:)

I live in Marshfield most all of my life. I deal in real estate and I am in the mercantile business. I have

stores elsewhere. I think about forty-seven thousand dollars was the value of this Railroad Addition, this Marshfield land that belonged to the Railroad Company, and went to the Southern Pacific Company in 1906, some forty blocks, approximately, in 1906, prior to the taking over of the property by the Southern Pacific Company.

CROSS EXAMINATION.

(By MR. McNAB:)

I think about two-thirds of it was on the level, and about one-third of it on the hill. I am familiar with actual sales which have been made in the tract. Mr. Merchant's house is situated in another addition, and along the front of his property are several blocks of the Railroad Addition. I bought some property there myself in 1906. I bought twenty lots for eighty dollars a lot. That was in Block 25; I should say about immediately in front of Mr. Merchant's house, and probably two blocks east. Those are 25-foot lots. The street work was done at that time to Second street. In 1906 the block where Mr. Powers lives was worth in 1906 about sixty dollars a lot. There are 40 lots. Forty lots at sixty dollars a lot, twenty-four hundred dollars for the block. That is probably half a mile from Mr. Merchant's house. I know an offer has been made for that block since 1906 by Mr. Powers; probably eight years ago. The offer was fifteen thousand dollars. Fifteen thousand dollars was offered and refused for that one block in 1908.

(Witness excused.)

WM. HOOD, recalled for defendants, on

DIRECT EXAMINATION.

(By MR. DUNNE:)

I have been chief engineer of the Southern Pacific Company for a great many years. I was chief engineer at the time the Southern Pacific took over the Coos Bay, Roseburg & Eastern Railroad. In my opinion the value of that railway property at the time they took it over in 1906 was that the purchase was what you might call a blanket trade and in considering the railroad as an item, we had in mind about six hundred and fifty thousand dollars for its then value.

CROSS EXAMINATION.

(By MR. McNAB:)

You could not say how much the Southern Pacific paid for it. I do not know of any specific sum being named when the Coos Bay deeded it over to the Southern Pacific. There may have been possibly, as a matter of technicality, but I don't know of it. The purchase was made by a lump sum. The sum was one million three hundred thousand dollars, covering certain properties, without any specification whatever on the vouchers or otherwise, that I know of.

There was the Coos Bay, Roseburg & Eastern Railroad, and the "Breakwater," and the "Czarina" and the eight hundred and thirty-nine acres of Beaver Hill Coal property, and the right to mine on four hundred and

sixty other acres of land, the mining machinery equipment, and store and dwellings; and the bunkers at San Francisco and their equipment; town property in Marshfield, lying to the westerly — the Railroad Addition. There were eleven hundred and seventy lots in the original tract of the so-called Railroad Addition, but ten of them were occupied by a school house and grounds. We acquired all the stock and bonds of the Coos Bay Railroad Company. In addition to that we acquired a cargo of rails, amounting to about twenty thousand dollars. The Railroad Company is operating the Beaver Hill Coal Mine at the present time. We have sold some few lots down at Marshfield; my remembrance is they were sold in 1907 or 1908; the Southern Pacific sold a few lots. Those that were sold were not far from the railroad reservation. I think they were sold at five hundred and twenty-five dollars, some lots, and one or two for six hundred dollars. We have sold a number of lots at five hundred and twenty-five dollars for a twenty-five foot lot; I think we sold two or three lots at that price. I considered a fair average price of one hundred dollars as the value of those lots. I would not say that we had sold any less than five hundred dollars apiece. I am only telling you what I know. I do know that we have sold several at five hundred and twenty-five dollars. We also sold two or three for six hundred dollars. We had an expert man examine the "Czarina," whose original cost was probably about one hundred and ten thousand dollars, and it was worth from twenty-five to fifty per cent of its original cost. I rated her as a matter of convenience in my head, as forty-two thousand

dollars. Our expert reported the value of the "Break-water" at one hundred and seventy-eight thousand dollars. After Mr. Spreckels bought her for seventy-five thousand dollars new machinery and boilers were put in her, and general repairs to the hull, costing one hundred and twenty-eight thousand dollars. It made her a very good boat.

(Witness excused.)

S. H. DANIELS, a witness called on behalf of defendants, being first duly sworn, testified as follows on

DIRECT EXAMINATION.

(By MR. DUNNE:)

I am assistant cashier of the Bank of California. I have been connected with the bank nearly forty-seven years. I have heard the satisfaction of judgment referred to here, mentioned in the agreement of June 8, 1899. That satisfaction of judgment is not in the possession of the Bank of California. I have searched the vault of the bank repeatedly for it, and the last date I can determine in my mind was the latter portion of last December, when two officers of the bank checked the vault for escrows and safe-keeping papers. It was not there. The National Bank Examiners checked the vault for all escrows and safe-keeping papers two or three weeks ago. I also made a search some years ago; the vault is always checked at the end of every year; and the searches I have made for this particular thing have been on a half dozen different occasions. It is not there.

I remember the trial of the so-called salary case, when Mr. Graham claimed a salary from the Coos Bay, Roseburg & Eastern. I went up there as a witness. I made a search at that time; it was not there.

CROSS EXAMINATION.

(Mr. McNAB:)

I made a search previous to going to Marshfield on the trial; I think it was in 1910. The Bank of California lost everything in the fire of 1906 that was not in the vaults. We had the accumulations of fifty years of business in the cellars, and I think some of those were lost.

(Witness excused.)

MR. HOHFELD: I desire in connection with and supplementing the testimony of Mr. Daniels, to read and offer in evidence the deposition of Irving F. Moulton, taken October 27, 1909, in this salary case.

MR. McNAB: I agree that it may be read here, your honor.

MR. HOHFELD: I was going to say that Mr. McNab kindly stipulated that this might be read instead of again calling Mr. Moulton.

MR. McNAB: I will just rest on whatever objections are made in the depositions. I do not know what they are.

MR. HOHFELD: There is a motion here by Mr. Minot to strike an answer out on the ground of its being incompetent, irrelevant and immaterial.

MR. McNAB: I will submit it to the Court when he reads the deposition.

PLAINTIFF'S EXCEPTION NO. FOURTEEN.

((The deposition is as follows:))

((Title of Court and cause, and recitals as to taking deposition, and parties present.))

IRVIN F. MOULTON, a witness produced on behalf of the defendants having been duly sworn, testified as follows:

(By MR. FOULDS:)

My name is Irving F. Moulton, age 52, residence 2199 Devisadero street, San Francisco; occupation, cashier of the Bank of California, since 1902. I am conversant with an instrument in writing known as the Trust Agreement of June 8th, 1899, between R. A. Graham, party of the first part, and J. D. Spreckels & Brothers Company, party of the second part, and under which the Bank of California acted as trustee for the parties.

MR. MINOT: I move to strike out the answer for the reason that it is incompetent, irrelevant and immaterial, the witness not having qualified as chief executive of the bank, a cashier in this particular instance, not

being shown that he was cashier at the time that this contract was executed, but that he was cashier at some time subsequent, and the testimony not showing what position he occupied when said instrument was executed.

MR. FOULDS. Q. State to the Court what the fact is as to whether or not R. A. Graham, mentioned as party of the first part in this agreement, within six months after June 8th, 1899, or at any time, or at all, paid to the Bank of California for the use and benefit of J. D. Spreckels & Brothers Company, or any one, the sum of \$550,000, or any sum whatever?

MR. MINOT: Objected to as incompetent, irrelevant and immaterial, for the reason that the witness is not qualified to answer that question.

A. Not at all.

MR. FOULDS: Q. What did the Bank of California do with the documents mentioned in this agreement of June 8, 1899, after the expiration of said period of six months from June 8th, 1899, and when did they do what was done under this agreement?

MR. MINOT: The same objection.

A. There was nothing done under the agreement except to return the papers after the escrow expired with J. D. Spreckels & Brothers Company.

MR. FOULDS: Q. Did Mr. Graham pay any money whatever?

MR. MINOT: The same objection.

A. He did not.

MR. FOULDS: Q. What did the Bank of California do with the documents mentioned in this agreement of June 8, 1899, after the expiration of said period of six months from June 8, 1899, and when did they do what was done under this agreement?

MR. MINOT: Objected to as indefinite, incompetent, irrelevant and immaterial, calling for the opinion of the witness, and not specifically designating what is intended to be proved.

A. The documents were to be returned to J. D. Spreckels & Brothers Company. The documents received by the Bank of California under the agreement of June 8, 1899, from the parties mentioned were different stocks, agreements and deeds all as mentioned in this paper.

Q. I do not care to have you read the entire document. You can state generally.

MR. MINOT: We object once more for the reason that the witness is supposed to testify from his own personal knowledge of these things. If he has no personal knowledge, he is not permitted to testify.

MR. FOULDS: Q. Have you the original escrow executed between these parties?

A. Yes, sir.

MR. FOULDS: We will offer it in evidence.

MR. MINOT: I object to the introduction of this document in evidence for the reason that it has been designated as an escrow when in truth and in fact it is not. It is a contract making the Bank of California a trustee, and not an escrow in any sense of the word.

(The document is received in evidence and marked "Defendant's Exhibit 1.")

(Here follows above offered document, being the agreement of June 8, 1899, above referred to.)

THE WITNESS: This is the Trust Agreement I have here. The documents received by the Bank of California from R. A. Graham and J. D. Spreckels & Brothers Company under the Trust Agreement of June 8th, 1899, were described in this Trust Agreement? The documents received and delivered by the Bank of California, and described in this Trust Agreement, were delivered by the Bank of California. Defendant's Exhibit 1 is the duplicate original which was in the possession of the Bank of California, and placed there by the parties named as parties thereto. I do not remember the signature of Mr. R. A. Graham. On page 8 of Defendant's Exhibit No. 1 over the writing, "I hereby acknowledge due receipt of the satisfaction of judgment here mentioned. Jan. 5th, 1900," the signature of R. A. Graham, which is there was not placed upon this document while it was in the custody of the Bank of California.

Q. Now, I call your attention to this memorandum signed: "San Francisco, November 14th, 1899," page 10 of this document, and signed: "J. D. Spreckels Bros. Co. By E. F. Preston, its attorney," and to a letter of date December 14th, 1899, purporting to be signed "J. D. Spreckels & Bros. Company, by A. B. Spreckels, vice president," addressed to the Bank of California, and ask you when, if you know, this receipt bearing date

November 14th, 1899, was actually written and signed with reference to the date of the letter of December 14th, 1899?

MR. MINOT: Objected to as incompetent, irrelevant and immaterial and indefinite, not setting forth or stating what that letter of January 14th, 1899, or the date given by counsel, whatever said date was.

A. I know that signature.

(WITNESS, continuing.) That is the true signature of Mr. Preston. I know that Mr. Preston was the attorney of the Spreckels Brothers Company at that time. The Bank of California actually delivered to J. D. Spreckels & Brothers Company the documents mentioned in the receipt of November 14th, 1899, on December 15, 1899. I know that from the records of the bank.

Q. You have in your possession now the records of the Bank showing the delivery of that document in the ordinary course of business?

MR. MINOT: Objected to as incompetent, irrelevant and immaterial, the witness not having qualified or shown that he was the custodian or keeper of those records, or that he made those records.

A. Yes, sir.

MR. MINOT: I move to strike out the answer on the same grounds.

(WITNESS, continuing.) In December, 1890, I was made assistant cashier, and I was assistant cashier until the latter part of 1902, when I was made cashier. In the course of the business I was one of those who

had charge of the records of the bank. The record I produce here now is the original record of the Bank of California, showing the transactions referred to in my testimony.

MR. MINOT: Counsel for plaintiff waives any further verification of the records of the Bank of California.

THE WITNESS (Continuing.): The entries made in that record produced here were made by some representative of the Bank of California whose duties required him to make such entries.

Q. Now, here is a special entry to which I desire to call your attention. I find an entry appearing in a book entitled "Records of Deposits, etc., left for safe keeping with the Bank of California of San Francisco," under date of June 18th, 1899, and I will ask you if that is the entry made by the Bank of California of the escrow agreement of June 8th, 1899, and the records thereunder?

MR. MINOT: Objected to as incompetent, irrelevant and immaterial and indefinite, for the reason that it did not designate or specifically point out the page, line, or exact place where the entry can be found for reference of the Court and counsel.

A. We received it on June 12th, and it appears on our Record of Deposits, etc., left for safe keeping with the Bank of California, of San Francisco. There is no page, because the entries are chronological.

MR. MINOT: Q. What page is it?

A. It is according to the year and month. There is no paging in the book. It is simply chronological.

MR. FOULDS: We offer in evidence the record referred to by the witness, and ask to have the same read into the record.

A. On the Record of Deposits, etc., left for safe keeping with the Bank of California, of San Francisco, under date of June 12th, 1899, is the record of the deposit of an escrow, bearing the Bank of California, numbered 2325, the address on the package being J. D. Spreckels & Bros. Co., R. A. Graham," the contents of the package being \$620,000 bonds, sundry stocks, deeds and agreements." Date of delivery, December 15th, 1899. Under the heading "We, the undersigned, hereby acknowledge the receipt of the packages set opposite our respective names in the same condition as when deposited," reads: "All papers and values delivered to J. D. Spreckels Bros. Company. See their receipt on the escrow agreement. S."

MR. MINOT: I move to strike out all the answer and everything stated by the witness, for the reason that it is incompetent, irrelevant and immaterial, and on the grounds that it is nowhere shown that at the time J. D. Spreckels & Brothers Company signed this receipt of packages set opposite said respective names, that R. A. Graham was present or consented to it, or acquiesced in it, or ratified it, and on the further ground that it is all a self-serving declaration and ex parte statements.

WITNESS (Continuing): I see the signature on page 10 of the Trust Agreement of S. P. Smith; he was an assistant cashier at the time, authorized to execute the agreement. I know Mr. E. F. Preston's signature. He was the attorney for J. D. Spreckels & Brothers Company. That is his signature, on a letter dated December 14th, 1899, appended to the Trust Agreement signed by A. B. Spreckels, vice president. I know his signature; that is his signature. On the back of that instrument, or at the end of it, there is an acceptance of trust, signed by the Bank of California, by S. B. Smith, as assistant cashier. The receipt is signed "J. D. Spreckels Brothers Company by E. F. Preston, its attorney." Also a letter of December 14th, 1899, signed J. D. Spreckels & Brothers Company, by A. B. Spreckels, vice president. I know all those signatures; and they are genuine; they are made by the parties whose names are signed thereto. The seal of the Bank of California is not here.

CROSS EXAMINATION.

(By MR. MINOT:)

Our papers were not destroyed by the fire; some of books were, and some of our correspondence. I never had any conversation with Mr. R. A. Graham pending the life of that Trust Agreement, nor concerning the contents of the Trust Agreement. I do not know whether any of the officials of the bank ever did. If any letter had been written, I would not necessarily have known about it. If letters had been written to some other officers by R. A. Graham and received by them they

would have been in this package. I turned over all these papers, documents, bonds and stock and agreements to J. D. Spreckels & Brothers Company at the request of J. D. Spreckels & Brothers Company. They were represented by their attorney, E. F. Preston. I gave them to Mr. Preston, for J. D. Spreckels & Brothers Company. To my knowledge Mr. Graham never demanded a satisfaction of the judgment obtained in Department 3, from me, or any official of the bank, under the terms of that agreement. I never heard of it. The following endorsement appears upon this duplicate of the original trust agreement: "I hereby acknowledge due receipt of the satisfaction of judgment here mentioned, Jan. 5th, 1900, R. A. Graham." That was delivered to him by Mr. Smith of the Bank of California. I do not know Mr. Graham's signature. When we turned over all these letters and papers, we complied, as far as the bank was concerned, with the terms and conditions of this contract or agreement, according to our idea. About the 2d day of July, 1907, we executed some deed to J. D. Spreckels & Brothers Company, or to the Southern Pacific Railroad Company. We did that under and by virtue of the power vested in you as trustee under this contract.

Q. Your authority for the execution of that deed then rested in this trust agreement?

MR. FOULDS: I object to the question as calling for the opinion of the witness. His authority is shown by the instrument itself, and he cannot be called upon to give a construction of the instrument.

A. Yes, sir. I would like to modify that answer,

“According to our views, we did.” We returned the documents which were handed to us, and which were recited in the agreement, but at that time, we were not asked for a return deed, and whether it was an oversight on our part, or on the part of J. D. Spreckels & Brothers Company, or whether they wanted to delay the return deed, I do not know, I do not know, I am not sure, but they did not call for a return deed until that time. It could have been had at any time. As a matter of fact we executed this deed as trustee at that time, referring to the deed of July 2, 1907, to J. D. Spreckels & Brothers Company.

MR. MINOT: Q. This deed that you executed on this date, covered, did it not, all of the following described property (here follows description of property in Railroad Addition to Marshfield, according to plat recording in the office of County Recorder of said Coos County, Oregon), and this property was a part of that Trust Agreement, was it not, that was turned over to the Bank of California under said Trust Agreement?

MR. FOULDS: I object to the question in the first place, on the ground that the deed itself is the best and only evidence of its contents; that the opinion of the witness is called for upon a matter of law as well as fact, and hence incompetent, irrelevant and immaterial to any issue in this case.

MR. MINOT: I move to strike out the objection of the learned counsel on the ground that the deed is in the hands of the opposite party, and not in our pos-

session, therefore we cannot use it, its contents is best known to them.

A. Our deed to the J. D. Spreckels & Brothers Company recited all that property which was conveyed to the Bank of California in trust through J. D. Spreckels & Brothers Company.

Q. Then as a matter of fact, the trust was not wound up until that time?

MR. FOULDS: I object to the question as calling for the opinion of the witness on a question of law.

A. I do not feel that I am competent to answer the question when it comes to a technicality like that.

Q. Did you, or did you not execute this deed under the power and authority of the trust given to the Bank of California under this contract. Did you or did you not?

MR. FOULDS: I object to the question on the same grounds as before, calling for the opinion of the witness.

A. I would rather not answer that question before I understand it. It was not considered necessary. I remember now—I do know that it came up in this case—but it was not considered necessary to give back the deed. The deed to us was never recorded, and it was not supposed it was necessary to give a deed back.

MR. FOULDS: I move to strike out the answer of the witness as not responsive to the question, and as immaterial and irrelevant.

MR. MINOT: Q. You executed the deed, though, did you not?

A. The bank executed the deed.

Q. And in executing the deed pursuant to the terms of that trust agreement and no other?

MR. FOULDS: The same objection.

A. Pursuant to the request of J. D. Spreckels & Brothers Company.

MR. MINOT: Q. Do you know who made that request for that deed?

A. Mr. Gibson. (Witness, continuing.) He is a brother-in-law of John D. Spreckels. He is in their employ. I do not remember the conversation. I merely remember his coming in and asking for a deed, a return deed. We referred him to our attorney who said: "Yes, if he wants it, give it to him." Our attorney is James M. Allen. When Mr. Gibson asked us for the deed he called our attention directly to this Trust Agreement between R. A. Graham and J. D. Spreckels & Brothers Company. That deed was executed afterwards by the Bank of California. I do not know whether Mr. Graham was consulted or not before delivering a portion or all the documents that we had in our possession to J. D. Spreckels & Brothers Company; in any way, by letter or in person, permitting us to turn them over, or whether there was any understanding or agreement or explanation of the conditions of the trust. Under the terms of the agreement, and against the order of the Spreckels Company, we turned them over to the Spreckels Company. From the fact that Mr. Graham's signature is there, receiving the satisfaction of judgment, I have every reason to believe that it was an amicable de-

livery at that time to the Spreckels Brothers. If there had been any question about it, I think I would know. The receipt on there was made subsequent to the delivery of the document to the Spreckels Brothers.

MR. DUNNE: I presume it will be understood that the word "against" in this deposition is used in the sense which business men sometimes use it in regard to the issue of stock against something; in other words, it means upon orders and not in opposition.

MR. HOHFELD: I desire to read and call attention to the place of location of receipts on this Trust Agreement, both with reference to the receipt of Mr. Graham and also to the receipt of J. D. Spreckels & Brothers Company. I would like you to admit, for the sake of shortening the record, Mr. McNab, it appears from the documents in evidence that Mr. Graham's receipt that has been spoken of both in this deposition and in the examination of Mr. Graham appears opposite subdivision F of paragraph ten, opposite the paragraph beginning "and said trustee shall at the same time deliver to the first party said satisfaction of said judgment entered in said suit mentioned in paragraph No. 4 of this agreement."

MR. FENTON: That appeared on the original at the time the deposition——

MR. McNAB: Whatever Judge Fenton says I will set as absolutely so, your honor.

MR. FENTON: Mr. Graham admitted the signatures.

MR. McNAB: Yes, and in this case also, but said he didn't receive the instrument.

MR. HOHFELD: I should also like to read the receipt of J. D. Spreckels & Brothers Company which appears on the last page of this agreement under the words:

" We hereby accept the foregoing trust. The
"Bank of California. F. C. Smith, A. Ca."

the following receipt:

" San Francisco, November 14, 1899.

" We hereby acknowledge delivery to us by the
"Bank of California and receipt by us from the
"Bank of California of all securities consisting of

" Sundry capital stocks;

" Sundry releases;

" Deeds of satisfaction;

" Letters of resignation;

" And any and all documents and papers, men-
"tioned in the within articles of agreement which
"delivery is accepted by the undersigned as full and
"complete acquittance of the within trust under-
"taken by the Bank of California.

" J. D. SPRECKELS & BROS. CO.

" By E. F. Preston,

" Its Attorney."

MR. HOHFELD: It appears in the deposition that the date November 14, 1899, was an error and should have been December 14, 1899.

F. S. SAMUELS, recalled as a witness on behalf of the defendants:

DIRECT EXAMINATION.

(By MR. HOHFELD:)

The entries in the book designated Minutes of the Beaver Hill Coal Company, on pages 40 and 41 of that book, are entirely in my handwriting; that is my signature.

(Counsel for defendant offers in evidence minutes of special meeting directors of Beaver Hill Coal Company, May 22, 1899, as follows:)

“ A special meeting of the board of directors of
“the Beaver Hill Coal Company was held on the
“22d day of May, 1899, at 11 A. M., at the office
“of the company, San Francisco, pursuant to a call
“therefor issued by the president A. B. Spreckels
“by personal notice served on each director as re-
“quired by article 13 of the by-laws. The meeting
“was called to order by A. B. Spreckels. Those
“present were: A. B. Spreckels, J. D. Spreckels,
“Chas. A. Hug, W. D. K. Gibson, F. S. Samuels.

“ Mr. A. B. Spreckels then stated that the object
“of the meeting was to authorize the president and
“secretary to execute a certain document in connec-
“tion with the settlement of matters in dispute be-
“tween the Beaver Hill Coal Co. and R. A. Graham.

“ The following resolution was thereupon introduced and on motion of J. D. Spreckels, seconded by Chas. A. Hug, was unanimously adopted.

“ WHEREAS, a settlement of all matters in dispute between R. A. Graham and the Beaver Hill Coal Co. have been made,

“ Now, therefore, it is resolved that a release of said Graham from all claims and demands of any and every kind and nature whatsoever existing against said Graham and in favor of this corporation at date hereof be executed by this corporation to said Graham and the president and secretary are hereby authorized to execute the same, in the name of this corporation, to attach thereto the corporate seal and to deliver the same upon execution of the agreement in writing, of settlement between R. A. Graham and J. D. Spreckels & Bros. Company and the execution, delivery and deposit of the various papers in said agreement mentioned.

“ There being no further business, on motion the meeting adjourned.

“ FRED'K S. SAMUELS,
“ Secty.”

(Marked: Complainant's Exhibit B.)

THE WITNESS (Continuing): Mr. Spreckels as president and myself as secretary prepared a release by the Beaver Hill Coal Company of all claims and demands against Mr. Graham. The release was drawn up by Colonel Preston, signed by Mr. A. B. Spreckels

as president and myself as secretary and executed before a notary public named King, I think, and was taken by me at the time of signing the document to the bank, and by myself handed to Mr. Preston. He and Mr. Froman were passing documents back and forth between them and at the proper time that paper was handed over to Mr. Froman. I don't know whether to Mr. Graham individually, but certainly to his attorneys.

MR. HOHFELD: Have you that document, Mr. McNab, if so we would like to have you produce it.

MR. McNAB: Mr. Graham testified he never received it.

(Counsel for defendant offers in evidence a copy of the by-laws of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, as follows:)

“ The corporate powers of this corporation shall
“be vested in a board of seven directors, who shall
“be stockholders holding one or more shares of
“stock on the books of the corporation and a ma-
“jority thereof shall constitute a quorum for the
“transaction of business.”

“BY-LAWS OF THE COOS BAY, ROSE-
“ BURG & EASTERN RAILROAD AND
“ NAVIGATION COMPANY.

“ ARTICLE I.

“ The corporate powers of this corporation shall
“be vested in a board of seven directors who shall

“be stockholders one or more shares of stock on the
“books of the corporation and a majority thereof
“shall constitute a quorum for the transaction of
“business.

“
ARTICLE II.

“ The first board of directors shall be elected at
“the first meeting of stockholders to serve for one
“year and until their successors are elected and
“qualified. Their term of office shall begin imme-
“diately after the election and their successors shall
“be elected at the annual meeting of the stockhold-
“ers, thereafter.

“
ARTICLE III.

“ Vacancies in the board of directors shall be
“filled by the other directors in office and such per-
“sons shall hold office until the next annual meeting
“of stockholders thereafter, or until their successors
“are elected and qualified.

“ARTICLE III (as amended by resolution of
“ directors at meeting of March 5, 1894.)

“ Vacancies in the board of directors shall be
“filled by the other directors in office, and such per-
“sons shall hold office until the next annual meeting
“of stockholders hereafter, or until their successors
“are elected and qualified. A vacancy may be de-
“clared in the board of directors whenever any
“director shall cease to be a resident of the state of

“Oregon or shall remain absent from the state for
“a period of two months consecutively or shall neglect or refuse to attend any meeting of said board
“for the term of two months. (See minutes,
“page 57.)

“
ARTICLE IV.

“ The annual meeting of stockholders shall be
“held in Roseburg, Oregon, on the third Monday
“of August of each year and shall be called by a
“notice printed in one or more papers, published
“in the city of Roseburg for at least ten days last
“preceding the day of meeting, or by notice in writing by the president delivered to each stockholder
“personally. The majority of the stock issued shall
“constitute a quorum at all meetings, general or
“special.

“ The directors shall call a special meeting of the
“stockholders at any time or place upon personal
“notice addressed to the residence of each said stockholder by the president or secretary of the said
“corporation.

“ARTICLE IV (as amended by resolution passed
“ at directors’ meeting, April 28, 1891.)

“ The annual meeting of the stockholders shall
“be held in Marshfield, Oregon, on the third Monday in August of each year and shall be called by
“a notice printed in one or more papers published
“in the city of Marshfield, for at least ten days next
“preceding the day of meeting, or by notice in writ-

“ing by the president delivered to each stockholder
“personally or at his place of business or residence.
“The majority of the stock issued shall constitute
“a quorum at all meetings, general or special.

“ Special meetings of the stockholders may be
“called at any time or place by the president or by
“the secretary upon the order of two directors upon
“written notice addressed to the stockholders at
“their place of business or residence, or delivered to
“them personally. (See minutes, page 27.)

“ ARTICLE V.

“ The officers shall be a president, vice president,
“secretary and treasurer, which officers shall be
“elected and hold office at pleasure of the board of
“directors, provided that said board may provide
“that one person may fill the offices of secretary
“and treasurer, and provided that said board may
“appoint or authorize the appointment of such addi-
“tional officers and agents they shall deem expe-
“dient.

“ ARTICLE VI.

“ The duties of the various officers shall be such
“as prescribed by law, and such additional duties as
“the board of directors shall authorize.

“ ARTICLE VII.

“ These by-laws may be amended or added to at
“any time by the board of directors.

“ ARTICLE VIII.

“ *Certificates of Stock.*

“ Certificates of stock shall be of such form and
“device as the board of directors may direct; and
“each certificate shall be signed by the president
“and countersigned by the secretary and express on
“its face its number, date of issuance, the number
“of shares for which the person to whom issued.

“ The certificate book shall contain a margin on
“which shall be entered the number, date, number
“of shares and name of the person expressed in the
“corresponding certificate.

“ ARTICLE IX.

“ *Transfer of Stock.*

“ Shares of the corporation may be transferred
“at any time by the holders thereof, or by attorney
“legally constituted or by their legal representa-
“tives, by endorsement on the certificate of stock.
“But no transfer shall be valid until the surrender
“of the certificate and the acknowledgment of such
“transfer on the books of the company.

“ No surrendered certificate shall be canceled by
“the secretary before a new one is issued in lieu
“thereof; and the secretary shall preserve the cer-
“tificate so cancelled as a voucher. If, however, a
“certificate shall be lost or destroyed the board of
“directors may order a new certificate issued upon

“such guarantees by the parties claiming the same
“as they may deem satisfactory.

“
ARTICLE X.

“ At all corporate meetings each stockholder,
“either in person or by proxy, shall be entitled to
“as many votes as he owns shares of stock. Such
“proxy shall be in writing and filed with the sec-
“retary.

“
ARTICLE XI.

“ President is hereby authorized to procure a cor-
“porate seal of a design to be selected by himself,
“which when procured shall be the seal of the cor-
“poration, and until so procured corporate seal shall
“be a circular scroll with a pen with the word ‘Seal’
“and the initials of this corporation written within
“the scroll.”

(By-laws marked: “Defendants’ Exhibit C.”)

THE WITNESS (Continuing): I remember distinctly Exhibits 4, 5, 6 and 7, which were offered in evidence and introduced, and attached to the deposition of Mr. Frohman. The circumstances under which these documents came into the possession of J. D. Spreckels & Brothers Company were that the Bank of California delivered them to us. They were delivered to us in the Bank of California, when we were all present handing over the various documents that each party was entitled to. I am referring to the 8th of June, at the time of the signing of the agreement.

(Counsel for defendant calls attention to fact that original release appears on a backer entitled "Garber & Garber," and also desires to have it appear in evidence that these other three releases are in the red backers. They have not the name E. F. Preston, but counsel wishes it to appear they are identical in color with the backers that have Mr. Preston's name on.)

THE WITNESS (Continuing): The circumstances under which the J. D. Spreckels & Brothers Company came into the possession of the release under the Garber back and the other three releases which are under the Preston backers were that it took some time to draw up all of the various documents that would be satisfactory to both parties and the attorneys were exchanging memoranda as to what each wanted. This one, the Garber one, which was sent by Mr. Frohman, was sent over by Mr. Frohman to Mr. Preston and shown to me at the time, didn't seem to cover what we were trying to get at; wasn't strong enough, wasn't broad enough. It was all right as far as it went, but to satisfy ourselves we insisted that these three Preston releases should also be signed by Mr. Graham. They were drawn by Mr. Preston, submitted to Mr. Frohman and afterwards signed by Mr. Graham. Upon receiving these, then we delivered the agreement. We had the agreement drawn up, signed by us and ready to be handed to Mr. Graham as soon as we received these releases. I am referring to the Trust Agreement of June 8, 1899.

(Counsel for defendants offers in evidence receipt from the Bank of California.)

(Marked: "Defendants' Exhibit D.")

" San Francisco, California, June 9, 1899.

" The Bank of California, the trustee under that
"certain agreement executed by R. A. Graham and
"J. D. Spreckels & Brothers Company upon the
"8th day of June, 1899, hereby acknowledges the
"delivery to it this day by said R. A. Graham of
"the following:

" 1. Certificates representing 9,992 shares of
"the capital stock of the Coos Bay, Roseburg &
"Eastern Railroad & Navigation Company, duly
"endorsed by transfer.

" 2. The resignations of J. B. Hassett, F. N.
"McLean, O. J. Seeley and William H. Trelease,
"as directors of the Coos Bay, Roseburg & Eastern
"Railroad & Navigation Comapny.

" 3. Release from R. A. Graham in favor of
"the Beaver Hill Coal Company.

" 4. Release and disclaimer executed by said R.
"A. Graham in favor of the Coos Bay, Roseburg &
"Eastern Railroad & Navigation Company.

" And said The Bank of California does hereby
"acknowledge the receipt this day from said J. D.
"Spreckels & Brothers Company of the following:

" 1. Certificate representing 10,001 shares of
"the capital stock of the Coos Bay, Roseburg &
"Eastern Railroad & Navigation Company, duly
"endorsed by transfer.

“ 2. Six hundred and twenty (620) bonds of
“the Coos Bay, Roseburg & Eastern Railroad &
“Navigation Company, each of the face value of
“\$1,000, with attached interest coupons.

“ 3. An assignment to the Bank of California
“of judgments against W. A. Border and Edward
“Bender in favor of said J. D. Spreckels & Brothers
“Company, in the Circuit Court of the County of
“Coos, State of Oregon.

“ 4. Certificates duly endorsed for transfer rep-
“resenting the capital stock of the Beaver Hill Coal
“Company, to wit: 4,995 shares.

“ 5. Satisfaction of judgment in the case of J.
“D. Spreckels & Brothers Company versus R. A.
“Graham, in the Superior Court of the City and
“County of San Francisco, State of California.

“ 6. An agreement executed by A. B. Spreck-
“els giving said R. A. Graham an option to pur-
“chase the interest of said A. B. Spreckels in certain
“real property in Coos County, State of Oregon,
“known as the Chadwick Tract.

“ The Bank of California does hereby further
“acknowledge the receipt from said R. A. Graham
“and J. D. Spreckels & Brothers Company of a
“deed to certain real property in the town of Marsh-
“field, County of Coos, State of Oregon, executed
“to wit: By said J. D. Spreckels & Brothers Com-
“pany and said R. A. Graham.

“ Said papers, stocks, bonds and documents to
“be held and hereafter delivered by said The Bank
“of California, as trustee in accordance with the
“terms of the agreement first above mentioned.

“ THE BANK OF CALIFORNIA,
“ S. P. Smith,
“ By A. Cash.”

(Counsel for defendants offers in evidence four releases in connection with the Frohman deposition.)

(Counsel for defendants offers in evidence release from R. A. Graham to the Beaver Hill Coal Company, this being the release mentioned in paragraph 3 of the bank's receipt under the papers acknowledged to have been received from R. A. Graham.)

(Marked: “Defendant's Exhibit E,” and reads as follows:)

“ For valuable consideration, the undersigned, R.
“A Graham, hereby releases and discharges the
“Beaver Hill Coal Company, a corporation, of and
“from any and all claims and demands which he
“may now have or claim to have against said com-
“pany, on account of any and all matters and things
“whatsoever.

“ This release not to take effect, however, except
“upon the failure of the undersigned to pay or cause
“to be paid to the Bank of California, a corporation,
“trustee, for the use and benefit of the J. D. Spreck-
“els & Brothers Company, a corporation, the sum

“of five hundred and fifty thousand (\$550,000)
“dollars, gold coin of the United States within six
“(6) months from the date hereof in accordance
“with the terms of an agreement this day executed
“between the undersigned and the said J. D.
“Spreckels & Brothers Company.

“ Dated June 8, 1899.

“ R. A. GRAHAM.

“ Witness: Isaac Frohman.”

(Counsel for defendants offers in evidence release from R. A. Graham of the Coos Bay Railroad, which is marked: “Defendant’s Exhibit F,” and is as follows:)

“ For valuable consideration, the undersigned,
“R. A. Graham, hereby releases and discharges the
“Coos Bay, Roseburg & Eastern Railroad & Nav-
“igation Company, a corporation, of and from any
“and all claims and demands which he may have or
“claim to have against said company, on account of
“any and all matters and things whatsoever.

“ And the undersigned hereby disclaims any and
“all right, title or interest in or to all and any of
“the property of said company, including the equip-
“ments and rolling stock of the railroad of said com-
“pany, and the spur tracks to the mine of the Beaver
“Hill Coal Company, and to the mine of the Beaver
“—— Coal Company, the same being known as the
“‘Klondike Mine.’

“ This release and disclaimer not to take effect,
“however, except upon the failure of the under-

“signed to pay or cause to be paid to The Bank of
“California, a corporation, trustee, for the use and
“benefit of the J. D. Spreckels & Bros. Company,
“a corporation, the sum of five hundred and fifty
“thousand (\$550,000) dollars, gold coin of the
“United States, within six (6) months from the
“date hereof, in accordance with the terms of an
“agreement this day executed between the under-
“signed and said J. D. Spreckels & Bros. Company.

“ Dated June 8th, 1899.

“ R. A. GRAHAM.

“ Witness: Isaac Frohman.”

MR. HOHFELD: That is the release mentioned in paragraph 4 of the bank's receipt under the papers received from Graham.

(Counsel for defendants offers in evidence the document mentioned in paragraph 6 of the bank's receipt, referring to papers received by the Bank of California from Spreckels & Brothers Company, and is an agreement executed by Mr. A. B. Spreckels giving to R. A. Graham the option to purchase the interest of A. B. Spreckels in the real property in the State of Oregon known as the Chadwick Tract; which is marked: “Defendants' Exhibit G,” and is as follows:)

“ For valuable consideration, I, A. B. Spreckels,
“of the City and County of San Francisco, State
“of California, do hereby promise and agree that,
“upon the payment to me by R. A. Graham, at any
“time within six (6) months from the date hereof,
“of the sum of money paid by me for all right, title

“and interest which I now have and hold in and to
“that certain real property in the County of Coos,
“State of Oregon, known as and called the ‘Chad-
“wick Tract,’ together with interest thereon at the
“rate of six (6) per cent per annum, I will execute
“and deliver to said R. A. Graham a deed of con-
“veyance of all my said right, title and interest in
“and to said real property.

“ Dated June 8th, 1899.

“ A. B. SPRECKELS.”

(Notary’s certificate.)

(Endorsed on cover: “Chadwick Tract Agreement
with R. A. Graham. Dated, June 8, 1899.”)

(Counsel for defendants offers in evidence document
mentioned in paragraph 3 of the bank’s receipt under
receipt of documents from the J. D. Spreckels & Brothers
Company. The document is marked: “Defendants’
Exhibit H,” and is as follows:)

“ KNOW ALL MEN BY THESE PRES-
“ENTS: That J. D. Spreckels & Brothers Com-
“pany, a corporation, the party of the first part,
“in consideration of the sum of ten (10) dollars,
“gold coin of the United States, to it in hand paid
“by The Bank of California, a corporation, trustee,
“the party of the second part, the receipt whereof
“is hereby acknowledged, does hereby sell and assign
“unto the said second party, and to its assigns, the
“following judgments recovered by the party of the
“first part in the Circuit Court for Coos County,
“State of Oregon, and all moneys due and to be-
“come due upon said judgments, to wit:

“ 1. Judgment against W. A. Border for the
“sum of \$1,320.00, recovered on the 12th day of
“October, 1897.

“ 2. Judgment against Edward Bender for the
“sum of \$1,120.50 principal and \$40.60 costs of suit,
“recovered on the 16th day of October, 1895, and
“affirmed on appeal to the Supreme Court of the
“said State of Oregon on the 24th day of May, 1897.

“ And the first party does hereby appoint the
“second party and its assigns the true and lawful
“attorney irrevocable of the first party, with power
“of substitution and revocation, for the use and at
“the proper costs of the second party and its assigns,
“to demand and receive the said money due and to
“become due upon said judgments, and to take out
“executions, and to take such other proceedings in
“the name of the first party or otherwise, as may
“be necessary for the recovery of said moneys due
“and to become due on said judgments.

“ IN WITNESS WHEREOF, the first party
“has caused its corporate name and seal to be here-
“unto affixed by its president and secretary respec-
“tively, this 8th day of June, 1899.

“J. D. SPRECKELS & BROS. COMPANY,

“ By John D. Spreckels, its President.

“ ((Seal)

“ Witness: C. A. Hug.

“ Fred'k S. Samuels, its Secretary.”

(C. E. F. Seegar, notary's certificate.)

(Counsel for defendants offers in evidence document mentioned in bank's receipt under paragraph 6 on page 2, a certified copy of which has already been put in evidence.)

(Document marked "Defendants' Exhibit I," being the same deed as contained in Plaintiff's Exhibit No. 43.)

(Counsel for defendants offers deed from Bank of California, trustee, to J. D. Spreckels & Brothers Company. The document is marked: "Defendants' Exhibit J," being the same deed as Complainant's Exhibit 44.)

THE WITNESS (Continuing): J. D. Spreckels & Brothers Company at the time that they received the other documents from the Bank of California at the expiration of the six months named in the Trust Agreement did not receive from the bank the satisfaction of judgment which had been referred to several times. We never at any time received that from the Bank of California. I have never seen that satisfaction since the time it was deposited with the Bank of California. J. D. Spreckels & Brothers Company delivered to the Bank of California at the time that his Trust Agreement was deposited with the bank, all the documents referred to in the receipt of the Bank of California.

(Counsel for defendants offers in evidence in connection with the Norman contract a declaration of trust by A. B. Spreckels as to Mr. Graham's interest in the stock, marked Defendants' Exhibit K, and is as follows:)

" KNOW ALL MEN BY THESE PRESENTS, that R. A. Graham of Marshfield, Coos

“County, Oregon, has this day endorsed to us and
“we have this day received from him twenty-five
“hundred (2500) shares of the Beaver Hill Coal
“Company, which we hereby declare that we hold
“for said R. A. Graham subject to the terms of
“those certain articles of agreement entered into by
“and between the said R. A. Graham and J. D.
“Spreckels & Brothers Company on the 20th day
“of December, 1894.

“ In witness whereof, J. D. Spreckels & Broth-
“ers Company has caused its name to be signed and
“its seal to be affixed this fifteenth day of May,
“1895.

“ J. D. SPRECKELS & BROTHERS
“ COMPANY,
“ A. B. Spreckels,
“ Vice President.”

CROSS EXAMINATION.

(By MR. McNAB:)

All these instruments bore date June 8, 1899, but
they may not all have been signed on that particular date.

!(Witness excused.)

C. E. S. WOOD, a witness called on behalf of the
complainant, being first duly sworn, testified as fol-
lows on

DIRECT EXAMINATION.

(By MR. McNAB:)

I am an attorney at law and have been a practitioner in the city of Portland for many years. I know Mr. R. A. Graham, the plaintiff. I have known him since about the time of the commencement of his Beaver Hill trouble. My firm was once attorneys for J. D. Spreckels & Brothers Company. Mr. Flanders handled the details of the business. John Couch Flanders is his full name. I remember having conferences or conversations with Mr. R. A. Graham as late as the year 1904 relating to his claims against J. D. Spreckels & Brothers Company arising out of an asserted ownership in the stocks and bonds of the Coos Bay Railroad, in New York City. I met Mr. Graham there and had several talks with him. Mr. Flanders was not there at that time. I was aware that a member of our firm was conducting negotiations with Mr. Graham relative to these disputes. It was regarded as Mr. Flanders' case and it was left to him. My only contact with it was Mr. Flanders occasionally discussed a proposition of law. I was in favor of trying to have some settlement with Graham quite regardless of the merits, just to save time and expense. Mr. Flanders as I remember it was opposed to any settlement and in some way, whether we talked to Graham's attorneys, this came to Mr. Graham's ears, that I was rather more favorably disposed to him and then he would try to see me and we had several talks. It just passed across it a long time ago and I can't be accurate about dates. My memory would be that during this time Mr.

Graham never ceased asserting his claim against the J. D. Spreckels & Brothers Company relative to an asserted ownership in the Coos Bay stock and bonds. Concerning the execution or signing by Mr. Graham of two stipulations looking to the entry of judgments or settling of two cases pending in the Federal Court at Portland, one brought by J. D. Spreckels & Brothers Company for a reorganization of the board of directors, and one brought by the Farmers Loan & Trust Company, I knew nothing whatever about these stipulations until after they had been executed. Then in some conversations, I said to Mr. Graham something to the effect that these stipulations ended the case, unless he could come through, as I remember it, with a large sum of money in a given time. He said something about these stipulations didn't end his case. I remember that in a vague way. As to whether during any of these conversations he set forth the claim that his failure to pay this money in six months did not deprive him of his property, I could not testify in that detail except that he asserted a claim notwithstanding the stipulations. In discussions with him he was always asserting his right to the property, I remember that.

MR. HOHFELD: I would like to have you admit, Mr. McNab, that Mr. A. A. Moore, one of the attorneys who represented Mr. Graham is still alive and a practicing attorney in San Francisco.

MR. McNAB: Yes, still alive. Practicing in Oakland. No dispute about Mr. Graham having been questioned concerning the releases, is there, and that he tes-

tified about his understanding it was not to be effective until the end of six months.

DEFENSE RESTS.

J. E. FOULDS, a witness called on behalf of the complainant in rebuttal, having been first duly sworn, testified as follows on

DIRECT EXAMINATION.

I was for many years one of counsel for Southern Pacific Company. I had something to do with the closing up of the transaction by which the Southern Pacific Railroad acquired from J. D. Spreckels & Brothers Company the Coos Bay and other properties which have been here discussed. The Southern Pacific Company at the time in the closing up of that transaction took no bond of indemnity. There were some instruments of indemnity, but they were of little character. I remember that among the Coos Bay railroad bonds at that time there was one missing and we received against that a special bond of indemnity. I think there was some litigation to which Mr. Graham was not a party at all, I think there was also an agreement of indemnity against that.

(Witness excused.)

“MR. HOHFELD: Mr. McNab, I would like to have you consent—you read in evidence a number of deeds and the dates of recording same. The deed from the Spreckels Company and Graham to the Bank of California being deed mentioned in the Trust Agree-

ment, and also the deed from the Bank of California to J. D. Spreckels & Bros. Company, and I would like to read here a statement of the transaction with reference to that property. That is, a statement as to the source of title from the Spreckels Brothers and then the successive conveyances after that, and this statement of facts, Mr. McNab, is contained in the statement of Judge Hanford, the District Judge who sat as one of the judges in the Circuit Court of Appeals in the Ninth Circuit, and which appears in his opinion delivered in the case of Sheridan vs. Southern Pacific Company, 179 Fed. 81."

I offer in evidence the following portion of opinion of Judge Hanford.

MR. McNAB: You don't offer the opinion as any evidence; merely for the purpose of showing the chain of title.

MR. HOHFELD: That is all, simply for the statement of facts as to these conveyances:

" 1. A deed conveying said property — said "property referring to the Marshfield property to "Thomas R. Sheridan as trustee executed by C. H. "Merchant and wife on the 16th day of October, "1890, and recorded on the 21st day of the same "month.

" 2. A deed conveying the same property from "Sheridan as trustee to J. D. Spreckels & Brothers "Company for the express consideration of fifty "thousand dollars, executed by the plaintiff as trustee the 22d day of August, 1893, and recorded "November 10, 1893.

MR. McNAB: I should like to offer the following resolution found on page 164 of the records of the Coos Bay Railroad:

“ The following resolution was offered by W. F. Miller, and upon his motion was unanimously adopted, all the stock present in person or by proxy, voting in favor of said resolution, to wit:

“ **RESOLVED**, that this company sell all of its properties, rights, privileges and franchises (except its franchise to be a corporation) as of midnight, June 30th, 1915, to the Southern Pacific Company, a corporation organized under the laws of the State of Kentucky, in consideration of the payment by said Southern Pacific Company to this company of the sum of three hundred thirty-nine thousand five hundred fifty-five dollars and twenty-two cents (\$339,555.22), and in further consideration of the assumption by said Southern Pacific Company of all indebtedness of this company then existing, and that in order to effect such purchase, the execution and delivery, in the name and on behalf of this company and under its corporate seal, of a deed from this company to said Southern Pacific Company are hereby authorized, consented to, approved, and ratified, such deed to be in substantially the following form, viz:

“THE COOS BAY, ROSEBURG & EAST-
“ERN RAILROAD & NAVIGATION
“COMPANY

“to
“SOUTHERN PACIFIC COMPANY

“DEED

“Dated July 1, 1915.

“INDENTURE, dated the first day of July,
“1915, and by and between The Coos Bay, Rose-
“burg & Eastern Railroad & Navigation Company,
“a corporation, of the State of Oregon (hereinafter
“called ‘Vendor’), party of the first part, and
“Southern Pacific Company, a corporation of the
“State of Kentucky (hereinafter called ‘Vendee’),
“party of the second part:

“WHEREAS, the boards of directors of the
“Vendor and Vendee, respectively, have agreed
“upon the grant, sale, conveyance and transfer here-
“inafter set forth, upon the terms and conditions of
“purchase and sale herein expressed, and have duly
“authorized the execution of this signature, and
“such grant, sale, conveyance and transfer have been
“duly authorized and consented to, approved and
“ratified by all the stockholders of the Vendor, hold-
“ing of record its entire issued capital stock, by
“unanimous vote at a special meeting of the stock-
“holders of the Vendor, called for that purpose and
“duly convened and held, and by stockholders of
“the Vendee holding of record more than two-thirds

“of its issued capital stock, by unanimous vote at
“an annual meeting of the stockholders of the Ven-
“dee, duly convened and held;

“ **NOW THEREFORE**, in consideration of
“the payment by the Vendee of the sum of three
“hundred and thirty-nine thousand, five hundred
“and fifty-five and 22/100 dollars (\$339,555.22)
“lawful money of the United States, the receipt
“where of is hereby acknowledged, and in further
“consideration of the assumption by the Vendee of
“the bonded and other indebtedness of the Vendor
“as hereinafter expressed, the Vendor has agreed to
“grant, bargain, sell, assign, transfer, release and
“convey, and hereby does grant, bargain, sell, as-
“sign, transfer, release and convey unto the Vendee,
“its successors and assigns;

“ (1) The Vendor’s line of railroad extending
“from Marshfield in a general southerly direction
“to Myrtle Point and its line of railroad extending
“from the connection with the aforesaid line of rail-
“road, at or near Beaver Hill Junction in a general
“westerly direction to Beaver Hill, all in Coos
“County, Oregon; also every other line of railroad,
“whether main line, branch or spur, projected,
“under construction or constructed, now owned by
“the Vendor and located in the State of Oregon,
“or any part thereof so located; together with all
“the rights, powers, immunities, privileges, fran-
“chises, rights of way and other property apper-
“taining to said lines of railroad.

“(2) All appropriations of real estate and
“other property made by the Vendor, and all suits,
“actions or rights of action instituted by the Vendor
“for the condemnation of property for use in con-
“nection with the railroads of the Vendor or any
“branch or extension thereof or addition thereto.

“(3) All other property of the Vendor, real,
“personal, and mixed, rights, privileges and fran-
“chises, of every kind, except its franchise to be a
“corporation.

“TO HAVE AND TO HOLD the above-de-
“scribed railroads, franchises, rights and other prop-
“erties unto the Vendee, its successors and assigns,
“forever; subject, however, to the mortgage and
“deed of trust executed by the Vendor to the Farm-
“ers' Loan & Trust Company, as trustee, under
“date April 28, 1891, and subject also to the mort-
“gage, dated March 1, 1915, executed by the Vendor
“to secure advances then or thereafter to be made.

“The Vendee hereby assumes and agrees to pay
“the First Mortgage Six Per Cent Thirty-year
“Gold Bonds of the Vendor, now outstanding to the
“principal amount of \$625,000, issued under and
“secured by the said mortgage and deed of trust
“of April 28, 1891, together with the interest due
“and hereafter maturing on said bonds; and the
“Vendee hereby assumes and agrees to pay the prin-
“cipal and interest of all other indebtedness of the
“Vendor now existing (including the indebtedness
“secured by the said mortgage of March 1, 1915)

“and the interest hereafter maturing on all such
“indebtedness; and the Vendor agrees to issue no
“more bonds under the former mortgage and to bor-
“row no more sums secured by the latter mortgage.

“ The Vendor hereby covenants with the Vendee,
“its successors and assigns, that the Vendor will at
“any and all times make, do, execute and deliver
“or cause to be made, done, executed and delivered,
“all and every such further acts, conveyances and
“assurances for the better assuring and confirming
“unto the Vendee, its successors and assigns, all and
“singular the property and franchises herein
“granted, or intended so to be, as shall be reason-
“ably required for the better accomplishing of the
“purpose of this indenture.

“ In consideration of the premises, the Vendee
“has agreed to, and hereby does, purchase the prop-
“erty and franchises hereinbefore described in the
“granting clauses hereof, and does hereby accept
“the conveyance thereof contained in this indenture,
“upon the terms and conditions hereinbefore stated;
“and the Vendee, being the holder of record of
“more than two-thirds of the issued capital stock
“of the Vendor, hereby authorizes, approves and
“consents to the grant, sale, conveyance and transfer
“by the Vendor to the Vendee of the said property
“and franchises, upon the consideration, terms and
“conditions herein expressed, and hereby approves
“and ratifies this indenture in all respects.

“ IN WITNESS WHEREOF, the parties
“hereto have caused this instrument to be executed
“in duplicate by their respective officers, thereunder
“duly authorized, and their respective corporate
“seals to be hereunto affixed, as of the day and
“year first above written.

“ THE COOS BAY, ROSEBURG & EAST-
“ ERN RAILROAD & NAVIGATION
“ COMPANY,

“ By.....
“ President.

“ Attest:
“ Secretary.

“ Executed in the presence of

“ SOUTHERN PACIFIC COMPANY,

“ By.....
“ President.

“ Attest:
“ Assistant Secretary.

“ (Notary certificates.)

“ SECRETARY'S CERTIFICATE.

“ I, G. L. King, Secretary of the Coos Bay,
“Roseburg & Eastern Railroad & Navigation Com-
“pany (the corporation designated as 'Vendor' in
“the foregoing indenture), do hereby certify: That
“I am custodian of the stock books of said Com-

“pany; that the entire amount of issued capital
 “stock of said company is 20,000 shares of the par
 “value of one hundred dollars each; and that the
 “Southern Pacific Company, the corporation de-
 “scribed in the foregoing instrument of consent, is
 “a stockholder of said The Coos Bay, Roseburg &
 “Eastern Railroad & Navigation Company, and
 “holds of record 19,993 shares of the issued capital
 “stock of said company of the par value of one
 “hundred dollars each, as appears by the stock books
 “of said company.

“ IN WITNESS WHEREOF, I have here-
 “unto subscribed my name as secretary and affixed
 “the seal of said company, this . . day of June, 1915.

“

“ Secretary of The Coos Bay, Roseburg & East-
 “ ern Railroad & Navigation Company.

“ (Notary's certificate.)

MR. McNAB: These were dated June 19, 1915.
 I think it is admissible on the question of value also.

(Counsel for plaintiff also offers in evidence certifi-
 cate of dissolution of the Coos Bay, Roseburg & Eastern
 Railroad & Navigation Company, to be found on page
 181 of the records of the Coos Bay Company, as follows:)

“ STATE OF OREGON.

“ Corporation Department.

“ CERTIFICATE OF DISSOLUTION.

“TO ALL TO WHOM THESE PRESENTS

“ MAY COME, GREETING:

“ KNOW YE: That whereas, THE COOS
“BAY, ROSEBURG & EASTERN RAIL-
“ROAD AND NAVIGATION COMPANY, a
“corporation, organized and existing under and
“pursuant to the laws of the State of Oregon, with
“its principal office at No. . . Street, in the City
“of Marshfield, in the County of Coos, State of
“Oregon, did on the 7th day of January, 1916, fur-
“nish in due form and file in the office of the Cor-
“poration Commissioner of the State of Oregon,
“a certificate and statement, duly verified by the
“secretary of said corporation, and a duly authen-
“ticated copy of the resolutions adopted by a ma-
“jority vote of the stockholders of said corporation
“at a meeting called for the purpose of authorizing
“the dissolution of such corporation and the settling
“of its business and disposing of its property, etc.,
“has paid the filing fee, and has complied with the
“requirements of Chapter 238 of the General Laws
“of Oregon for 1913, providing for the dissolution
“of private corporations, preliminary to the issuing
“of this

“ CERTIFICATE OF DISSOLUTION.

“ AND KNOW YE FURTHER, that said
“corporation did on the 7th day of January, 1916,
“furnish in due form and file in the office of the
“Corporation Commissioner of the State of Oregon
“a certificate and statement duly verified by the
“secretary of said corporation, and a duly authen-
“ticated copy of the resolutions adopted by a ma-
“jority vote of the directors of said corporation au-
“thorizing the dissolution of such corporation in con-
“formity with the provisions of the said Chapter
“238, General Laws of Oregon, for 1913;

“ NOW THEREFORE, I, H. J. SCHUL-
“DERMAN, Corporation Commissioner of the
“State of Oregon, do hereby certify that lawful evi-
“dence of the passage of the resolution for dissolu-
“tion of the

“THE COOS BAY, ROSEBURG & EAST-
“ERN RAILROAD AND NAVIGATION
“COMPANY,

“a corporation, with its principal office at No. . .
“Street in the City of Marshfield, in the County of
“Coos, State of Oregon, has furnished as required
“by Chapter 238, General Laws of Oregon, for
“1913, which said certificate and statement, and
“record of proceedings, aforesaid, are now on file
“in my office, as required by law.

“ AND I FURTHER CERTIFY, that said
“corporation has paid the fee of five dollars (\$5.00)

“for filing a certificate and statement of dissolution
“as required by law.

“ IN TESTIMONY WHEREOF, I have
“hereunto set my hand and affixed hereto the Seal
“of the Corporation Department of the State of
“Oregon.

“ Done at the Capitol, at Salem, Oregon, this
“7th day of January, 1916.

“ H. J. SCHULDERMAN,

“ (Seal) Corporation Commissioner.”

MR. McNAB: We have in this judgment roll No. 2934, being the Farmers Loan & Trust Company vs. the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, the report of the receiver, Mr. Chandler, from the beginning of his appointment down to the period of his discharge. These are his reports.

I offer them in evidence for the purpose of showing from these records that J. D. Spreckels & Brothers Company did not advance any sum to the railroad during the period of receivership except such as were repaid, other than some small amounts which appear in the accounts themselves. They commence with receiver's report of receipts and disbursements from April 15, to May 9, 1900, which report was filed in the United States Circuit Court July 5, 1900, down to and inclusive of the report of receipts and disbursements for the month of May, 1906, which report was filed in the United States Circuit Court July 10, 1906, as appears by the clerk's

record in judgment roll 2934, in the case of Farmers Loan & Trust Company vs. Coos Bay, Roseburg & Eastern Railroad & Navigation Company.

(Counsel for respective parties consent and agree that the original record may be transferred, in case of appeal, to the court of appeals.)

COMPLAINANT RESTS.

DEFENDANTS REST.

TESTIMONY CLOSED.

(OPINION.)

(Title of Court and Cause.)

Portland, Oregon, Monday, May 22, 1916.

R. S. BEAN, District Judge:

A careful consideration of this case in the light of the testimony, the argument of counsel, and authorities cited by them, confirms the view heretofore expressed that the contract of June 8, 1899, between plaintiff and defendant Spreckels & Bros. Company, was not a mortgage or pledge or continuing security for the payment of a debt, but was designed to and did put an end to the relation of debtor and creditor between them.

It is settled in law that no force will be given by a court of equity to an agreement of a mortgagor contained in a mortgage, or made contemporaneously therewith, that if he fails to make payment of the debt within a stated time the mortgagee shall become the absolute owner of the mortgaged property. (27 Cyc. 1098.)

There seems, however, to be a conflict in the authorities as to whether he can do so by a subsequent executory agreement fairly entered into. The courts of California, where the contract in suit was made and to be performed, recognize such a right. (*Bradbury v. Davenport*, 120 Cal. 152.) It is denied by other courts. (*Holden L. & T. Co. v. Interstate T. Co.*, 123 Pac. 733.)

But I do not deem it necessary to consider that question at this time because, in my judgment, the contract in suit was not a mortgage or pledge nor an agreement to cut off or bar an equity of redemption but, as stated on its face, was for the purpose of completely adjusting all differences between the parties, not only growing out of the suit then pending in California, but other suits and actions in the courts of California and Oregon, and divers claims and demands made by one against the other and the corporation in which they were mutually interested. The reason for this conclusion are stated in memorandum heretofore filed overruling the demurrer to the answer and need not be elaborated. The evidence, in my judgment, does not show that the contract was made under circumstances which render its enforcement unconscionable. It was voluntarily entered into by the plaintiff after days of negotiation with full knowledge of all the facts, under the advice of able counsel, and there is nothing in the testimony, so far as I can see, to indicate that plaintiff was overreached or imposed upon in any way in the making of the contract. It may be and perhaps is true that he was in straightened financial circumstances and believed that the contract promised

the most feasible way for him to save something out of his Coos Bay ventures, but if so it affords no legal reason why the contract should not be enforced as made.

The bill will therefore be dismissed.

**STIPULATION OF COUNSEL SETTLING
EVIDENCE UNDER EQUITY RULE 75.**

IT IS HEREBY STIPULATED by and between the appellant and appellees that the foregoing constitutes a true and complete statement of the evidence pursuant to said Equity Rule 75, and (with the original records heretofore stipulated to be sent up in their original form and mentioned in the foregoing statement) constitutes all of the evidence introduced in the above-entitled action, and

IT IS HEREBY FURTHER STIPULATED that the foregoing statement may be settled, allowed, approved and filed in the above-entitled action, and be printed in the transcript to be prepared on appeal in said action.

Dated: October 17th, 1916.

**JOHN L. McNAB,
MARTIN L. PIPES AND
ROBERT M. REID,**

Attorneys for Appellant.

**MORRISON, DUNNE & BROBECK,
FENTON, DEY, HAMPSON &
FENTON,**

Attorneys for Appellees.

ORDER APPROVING STATEMENT OF EVIDENCE UNDER EQUITY RULE 75.

Pursuant to the foregoing stipulation, the foregoing transcript is hereby settled, allowed and approved as a true and correct statement of the evidence pursuant to Equity Rule 75.

Dated: October 27th, 1916.

R. S. BEAN, Judge.

Filed October 30, 1916.

G. H. MARSH, Clerk.

UNITED STATES OF AMERICA,

District of Oregon—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that I have prepared the foregoing printed transcript of record on appeal, in the case in which R. A. Graham is plaintiff and appellant, and J. D. Spreckels & Bros. Company, a corporation, and Southern Pacific Company, a corporation, are defendants and appellees, in accordance with the law and the rules of court, and in accordance with the direction of the praecipes for transcript filed by said appellant and appellees in said cause; and I further certify that the foregoing transcript is a full, true, and correct transcript of the record and proceedings had in said court in said cause, which the said praecipes designated to be included therein, as the same appear of record and on file at my office and in my custody.

And I further certify that in accordance with the orders of the said court appearing in the foregoing printed transcript of record, I have transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, as a part of the record in said cause on appeal, the following original exhibits and papers, viz:

Complainant's Exhibit No. 29, being an original charter party between James Tuft, agent for the owner of the schooner "Peerless" and Robert A. Graham by J. D. Spreckels & Bros. Company, dated August 27, 1897.

Complainant's Exhibit No. 38, being original profiles of the Coos Bay, Roseburg & Eastern Railroad and Navigation Company.

Reports of W. S. Chandler, receiver of the Coos Bay, Roseburg & Eastern Railroad and Navigation Company filed among the papers in the case of Farmers' Loan & Trust Co. v. Coos Bay, Roseburg & Eastern Railroad and Navigation Company, being judgment roll No. 2934 of this court.

Account rendered by J. D. Spreckels & Bros. Co. to R. A. Graham—Complainant's Exhibit 46.

In the Circuit Court of the United States for the District of Oregon, being judgment roll in this court No. 2388, J. D. Spreckels and Bros. Company, a corporation, v. Coos Bay, Roseburg and Eastern Railroad and Navigation Company, a corporation, et al.

In the Circuit Court of the United State for the District of Oregon, being judgment roll in this

court No. 2487, *R. A. Graham v. Beaver Hill Coal Company, et al.*

In the Circuit Court of the United States for the District of Oregon, being judgment roll in this court No. 2933, *J. D. Spreckels and Bros. Company, a corporation, v. Coos Bay, Roseburg and Eastern Railroad and Navigation Company, a corporation Company, a corporation, et al.*

In the Circuit Court of the United States, being judgment roll in this court No. 2934, *Farmers' Loan & Trust Company, a corporation, v. Coos Bay, Roseburg & Eastern Railroad and Navigation Company, a corporation, et al.*

The original deposition of Isaac Frohman taken and filed in this action of *Graham v. Spreckels, et al*, with all the exhibits thereunto attached, and made a part thereof.

Complainant's Exhibit No. 45, being deed from *J. D. Spreckels and Bros. Company, a corporation, to Southern Pacific Company, a corporation, dated July 2, 1906, and recorded July 31, 1906.*

And I further certify that the cost of the foregoing record is \$., and that the same has been paid by said appellant.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Portland, in said district, this day of December, A. D. 1916.

.....
Clerk.



No. 2904

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

R. A. GRAHAM,

Appellant,

VS.

THE J. D. SPRECKELS & BROTHERS COMPANY
(a corporation) and the SOUTHERN PACIFIC
COMPANY (a corporation),

Appellees.

BRIEF FOR APPELLANT.

JOHN L. McNAB,

Attorney for Appellant.

Filed

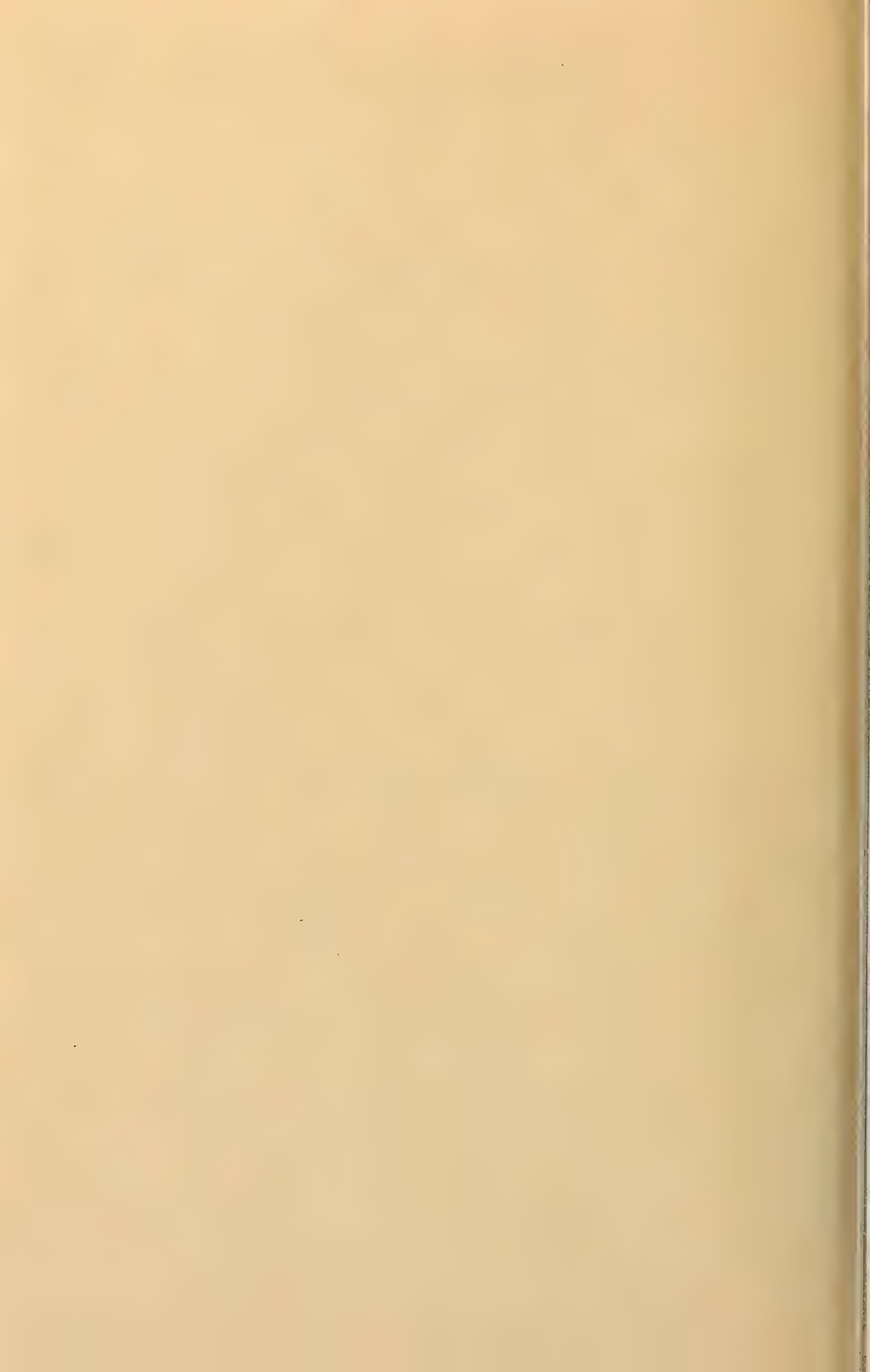
JAN 30 1917

Filed this.....day of January, 1917.

F. D. Monckton,
Clerk.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.



No. 2904

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

R. A. GRAHAM,

Appellant,

VS.

THE J. D. SPRECKELS & BROTHERS COMPANY
(a corporation) and the SOUTHERN PACIFIC
COMPANY (a corporation),

Appellees.

BRIEF FOR APPELLANT.

Abstract of Questions Involved.

A detailed statement of the facts, together with an exposition of the legal questions involved, will be hereafter given in this brief.

In order, however, that the Court may understand the general nature of the controversy, the following brief abstract called for by the Rules, is given:

This action was commenced, in conversion, against the defendants, and it was alleged that the defendant, J. D. Spreckels & Bros. Co., had unlawfully converted to its own use, by selling to the Southern

Pacific Company 20,000 shares of stock of the Coos Bay, Roseburg and Eastern Railroad and Navigation Company of the alleged value of \$600,000, and 620 bonds of said Company of the value of \$620,000.

By amended complaint the action was amplified into a general equity suit. The history of the controversy between the plaintiff and the defendants is long and involved and it will not be necessary to review it here for the purpose of stating the nature of the questions involved.

In brief, however:

The plaintiff, R. A. Graham, was the builder of the Coos Bay, Roseburg and Eastern Railroad and Navigation Railway. After having taken the contract for the building of said road he acquired all of the stocks and bonds and subsidies of the said railroad corporation. Later the defendant, J. D. Spreckels & Bros. Co. became interested in financing the building of the railroad. The Spreckels Company took from Graham an agreement by which Graham delivered to the Spreckels Company 10,001 shares out of the 20,000 shares of the Railroad Company, and agreed to deliver the bonds of the Company as they should be issued. The bonds were to be issued as the road progressed. The Spreckels Company became the financial agent and was to have interest on all moneys advanced; was made sole agent for the sale of bonds; was to receive a commission for the sale of the

bonds, a bonus on all moneys advanced, and ten per cent of the profit of the building of the railroad.

The Spreckels Company agreed to finance the building of the railroad from Marshfield on the coast through Myrtle Point to Roseburg in the State of Oregon (Tr. pp. 204 and 23 and 272). Graham carried out his contract and completed the road to Myrtle Point, delivering over in addition to the stock of the corporation \$620,000 par value of the bonds and assigned over all the railroad subsidies and lands, amounting to about \$200,000 (Tr. pp. 203-231-232-233). The Spreckels Company having refused to carry out for the present its agreement to finance the road through to Roseburg, on account of alleged depression in the bond market (Tr. p. 237), the plaintiff Graham was faced with the necessity of producing freight for the railroad, and thereupon acquired, after an expenditure of \$10,000 of his own funds (Tr. p. 249), a working contract on the Norman mining lands of great value, and graded a railroad to it from the line of the Coos Bay Railway at his own cost of about \$30,000 (Tr. p. 241), making a total of \$40,000 (p. 249). Later, this contract, without profit to Graham, was transferred to A. B. Spreckels, who formed a corporation known as the Beaver Hill Coal Co. with a capital stock of 5000 shares, 2500 of which were put in the name of Graham but retained by the Company not to be delivered until the profits should pay for them (Tr. pp. 244-6-249). Graham was made manager at the bare living

salary of \$150.00 a month, plus payment of the premiums on two life insurance policies, one for the benefit of Mrs. Graham and the other assigned to The Spreckels Company, but payable to Graham in case he should outlive its maturity (Tr. pp. 256-7-8). He outlived the maturity of the policy, but as will be hereafter explained The Spreckels Company still retains and is contesting for the proceeds of this policy, in the Federal Court at San Francisco. At the time of the completion of the road to Myrtle Point and the inception of the Beaver Hill Coal Co., Graham had invested of his own funds \$240,000 and had contributed the land at Marshfield, valued at \$200,000 (see Tr. pp. 258-259). [N. B. By clerical error in the transcript Graham appears to say that he received the money on this policy. This is an admitted error of typing as is made clear from other parts of Graham's testimony. The money is on deposit in an interpleader suit brought against Graham and Spreckels by the New York Life Insurance Co. (see Graham, Tr. p. 472).

Friction arose owing to Spreckels trying to obtain control of the mine. Spreckels, violating all his contracts, ordered Graham to San Francisco and suddenly demanded (p. 271) his signature to a promissory note for \$523,000, \$217,011 of which was made up of interest bonuses and interest on bonuses, compounded quarterly (Tr. p. 630). Graham refused to sign on the ground that it was a violation of all their agreements and meant financial ruin to him, and stated that it was evident

that The Spreckels Company had decided to force him out of business; but he was finally induced to sign under the promise that he would be continued as manager, given \$65,000 capital to complete the operations of the mine, and the 2500 shares of the Beaver Hill stock; also the life insurance policy of \$50,000 was to be returned to him (Tr. pp. 275-6). Graham left the city, and on arriving at home discovered that the moment he left San Francisco Spreckels had broken all his contracts and promises. Graham was discharged from managing the mine; his powers of attorney revoked; an enemy by name of Chandler, who had been spying at the mine for Spreckels was placed in charge at a salary of \$4000 a year (Tr. p. 570). Thereafter The Spreckels Company, in order to ruin Graham, shut down the mine in order to deprive the railroad of its freight and later commenced a series of actions against Graham, designed to ruin his connection with the railroad, destroy his financial credit and drive him into bankruptcy.

The Spreckels Company, having deprived Graham of his income and while it had \$6,000.00 of Graham's money in its possession—enough to pay the interest on the \$523,000.00 note for months—and while nothing was due on the note suddenly commenced action to foreclose all the securities on the promissory note.

The suit went to trial and while on trial was halted by an agreement dated June 8th, 1899. This contract is appended to this brief, for convenience,

and is marked *Exhibit "A"*. Its provisions are too numerous to detail here but in short its outstanding features are as follows:

The Spreckels Company delivered Graham's securities, bonds, stocks, deeds, etc., which it held as collateral to the Bank of California. Graham was given six months in which to pay \$550,000.00 and draw down his property. A judgment was entered against Graham by stipulation in the pending suit on the \$523,000.00 note and *this debt and the judgment for the debt were kept alive during the whole six months' period*. It was provided that if *at the expiration of six months* Graham did not pay the \$550,000.00 that *AT the expiration of six months* the title should pass to The Spreckels Company.

There are many other provisions.

This contract was drawn at the suggestion of Collis P. Huntington, president of the Southern Pacific Company, who promised to come to the relief of Graham, and who agreed for the Southern Pacific Company to pay over the money to enable Graham to redeem his properties and who was then to have a contract covering the future of the railroad and mine.

As detailed hereafter, The Spreckels Company, knowing whence the money was to come, deliberately set about, through its attorney, to destroy Graham's ability to get the money and succeeded in persuading the Southern Pacific Company not to pay the \$550,000.00, promising that The Spreckels Company

on securing Graham's property would negotiate its own arrangements with the Southern Pacific Company, agreeably to both those companies.

Graham, by virtue of Spreckels' bad faith, was unable to pay the \$550,000.00. The Bank of California, over the protest of Graham, delivered all of the property deposited with it to The Spreckels Company, who seized the railroad by force and later sold to the Southern Pacific Company for \$1,300,000—a sum vastly greater than all amounts ever due by Graham to The Spreckels Company.

The legal questions involved are as follows:

First: That the contract of June 8th, 1899, is on its face a mortgage, pledge or security and not a conditional sale of Graham's properties as contended by the defendants.

Second: The contract of June 8th, 1899, was made under such circumstances of duress and oppression, and as the result of such a prolonged course of consistent oppression and coercion by the creditor, The Spreckels Company, over its debtor, R. A. Graham, that equity will hold it to be a mortgage, pledge or security with a right on the part of Graham to an accounting and the right to redeem, and, in view of the sale to the Southern Pacific Company, which had full notice, to a judgment.

The facts in detail appear hereafter in the statement of facts.

Statement of Specifications in Which Decree is Erroneous.

The assignments of error are set forth on pages 181 to 185 of the transcript. They are sixteen in number, and all of the assignments are relied upon. They raise for decision by this Court two questions, namely:

- 1st. *Was the contract of June 8, 1899, an instrument in the nature of a mortgage, pledge or security, by which the plaintiff, R. A. Graham, did not part with the title to his property, and under which he could not be deprived of his property without appropriate action to terminate his right of redemption?*
- 2nd. *Was the contract of June 8, 1899, executed as the culmination of oppressive acts exercised by the creditor, The Spreckels Company, over the debtor, R. A. Graham, and under circumstances which require a court of equity, in justice, to declare it to be a mortgage, pledge or security?*

The assignments merely raise the various elements of these questions and challenge the correctness of the decree dismissing the complainant's bill on the two broad grounds above set forth.

Statement of Facts.

This is an appeal from a decree of the District Court of the United States for the District of Oregon, dismissing a bill of complaint filed by the appellant, R. A. Graham.

This action was originally commenced in the Circuit Court of the State of Oregon, charging the defendants with the conversion (a) of the entire capital stock of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, consisting of twenty thousand shares of the par value of one hundred (\$100) dollars each and of the actual value of thirty (\$30) dollars each, or a total of six hundred thousand (\$600,000) dollars, and (b) of all the bonds of said company, amounting to six hundred and twenty thousand (\$620,000) dollars (p. 3).

Thereafter, the action against the defendant was amplified by the filing of an amended complaint under the act of Congress permitting the changing of a cause from law to equity and this amended complaint, involving the same property, itself forms a practical statement of the facts upon which the plaintiff relies (Tr. pp. 15-46).

The testimony of the plaintiff R. A. Graham appears on pages 200 to 474 inclusive of the transcript. It forms a vivid and graphic picture of the systematic acts of oppression by which he was driven to financial ruin. The striking feature of this remarkable narrative is that it stands practically undisputed in every essential detail; and is at every step fortified by the entries in his diaries made throughout the years in controversy. Notwithstanding A. B. Spreckels, John D. Spreckels, Secretary Samuels and W. D. K. Gibson, treasurer, were alive, those who appeared at the trial were compelled to admit or failed to deny every essential charge; while

the defendant A. B. Spreckels, although alive and an office holder of San Francisco, failed to testify at all although much of the most vital testimony related to his acts.

**HISTORY OF THE PROCEEDINGS UP TO AND INCLUDING THE
MAKING OF THE CONTRACT OF JUNE 8, 1899.**

About the year 1890, the plaintiff, R. A. Graham, engaged in the building of the Coos Bay, Roseburg & Eastern Railway, commencing at Marshfield, Oregon, and to be projected through Myrtle Point to Roseburg in the same state. He took over the corporation formed by the community for building, the railroad with all its subsidies, etc. (pp. 200-201).

The defendant, The J. D. Spreckels & Brothers Company, became interested with Graham and agreed to finance the building of the railroad through Myrtle Point to Roseburg (Tr. pp. 204 and 237; also 273).

Graham agreed to deposit the bonds of the railroad as rapidly as issued and also a majority of the capital stock of the railroad as security; Spreckels was to receive interest at seven per cent, a five per cent bonus on advances and was made the sole agent for the disposition of the bonds and was to receive ten per cent commission on the sale of the bonds *and also a ten per cent commission on the amount of profit in the cost of the construction of the railroad from Myrtle Point to Roseburg* (Tr. pp. 203-4-229).

The witness, J. D. Spreckels, who was the only one of the Spreckels brothers to take the stand, admitted these contracts when confronted by them, but professed to have forgotten all about them (Tr. p. 550).

Some small modifications as to commissions and the like were made (Tr. p. 230) and it was the agreement between the parties that The Spreckels Company should be reimbursed for all of its expenditures *out of the proceeds of the sales of the bonds when sold* (Tr. p. 231).

Pursuant to the agreement, the appellant, Graham, delivered to The J. D. Spreckels & Brothers Company all of the bonds as fast as they were issued, the majority of the stock of the railroad company, the subsidy list which had been subscribed by the community for the encouragement of the railroad (p. 200), and the contracts by which Graham was to receive about two hundred thousand dollars in real estate on the Marshfield water front (Tr. pp. 231-2-3).

Graham went forward with the construction of the railroad and completed it to Myrtle Point—a distance of twenty-seven miles—having contributed about one hundred eighty thousand dollars of his own funds, and Spreckels about a like amount (Tr. pp. 232-3). By the time the railroad was completed to Myrtle Point Graham “had turned over to J. D. Spreckels Co. this land that was set out later in the note, the 10,001 shares of stock and 620 bonds of a thousand dollars each” (pp. 232-3).

At this time, Spreckels, finding that he could not as readily dispose of the bonds as his firm had anticipated, came to the conclusion, regardless of his agreement, that the railroad should stop at Myrtle Point until the market improved (see Spreckels' letter, p. 237), notwithstanding there had been no modification of his agreement to build to Roseburg (Tr. pp. 273 and 237). Graham had been depending upon the railroad reaching Roseburg in order to get freight and through the Spreckels' failure to advance the necessary means in accordance with the agreement, was compelled to look to other sources in order to develop freight to carry over the railroad. Accordingly, Graham located a field of valuable coal mines and secured a working option thereon from a man named Norman (Tr. pp. 239-240). Graham expended about ten thousand (\$10,000) dollars of his own funds in developing this mine, and about \$30,000 in grading a railroad to it from the Coos Bay Railway, making a total expenditure of \$40,000 from his own funds (Tr. pp. 240 and 249). He brought the matter to the attention of The Spreckels Co., who proposed that it take over the mine, form a corporation, issue half of the stock in Graham's name, but hold it in the possession of the company, and agreed to thoroughly equip the mine and put Graham in charge as manager (Tr. pp. 244 et seq.). Graham surrendered his contract for the purchase of the mine without profit of any kind (Tr. p. 472); he did not receive "a cent for it" (Tr. p. 472); the corporation was formed

under the name of Beaver Hill Coal Company, with a capital stock of five thousand (5,000) shares, of which twenty-five hundred (2,500) were issued to Graham who regularly attended the meetings of the directors thereafter. By the time the railroad was completed to Myrtle Point, and the inception of the Beaver Hill Coal Co., Graham had invested of his own funds \$240,000 and had contributed the lands at Marshfield valued at \$200,000 (see Tr. pp. 258-259). Graham was receiving no salary from the railroad company and never received any, notwithstanding he built the road. To encourage the development of the mine, Graham agreed to accept \$150 per month as a salary to cover his bare expenses (Tr. p. 472), and The Spreckels Company was to pay the premiums on two life insurance policies for \$50,000 each, one being made payable to Graham's wife, and the other was assigned to The Spreckels Company, under the agreement that it was to be returned if Graham outlived its maturity (Tr. pp. 255-257).

Graham devoted himself to the development of the mine which required the building of a village for miners, importing negro miners from Virginia, building a hospital, local school, installing of compressors, and doing a vast amount of development work (Graham, Tr. p. 262; admissions of Samuels, Tr. pp. 606-612). Then Graham began to ship coal over the railroad as fast as it could be developed, this being practically the entire source of freight to the railroad. Thereafter, friction arose because

The Spreckels Company insisted upon larger quantities of coal being shipped in spite of the protests of Graham and his expert that to tear out coal faster would be to destroy the mine as it was necessary to project the tunnels to the rear of the ledges and pull out the coal, allowing the mine to cave in behind, whereas if the coal were taken out from the front, the entire roof would have caved in and destroyed the mine (Tr. pp. 262 et seq.).

The Spreckels Company from this time on, clearly determined to acquire possession of everything Graham had. A series of petty persecutions were commenced and intolerable demands were made. A hostile, so-called expert, by the name of Chandler, who was utterly discredited on the witness stand for rank perjury (see Tr. pp. 579-580), was sent by The Spreckels Company to the mine, ostensibly to study certain drilling operations and relieve the strain on Graham, but really to undermine and supplant Graham (Tr. pp. 266-268).

Witness Samuels testified (Tr. p. 617):

“When I sent Mr. Chandler up I expected to get control of the property and books so we could get a chance to expert them; that was one thing I had in view.”

Graham brought the output of the mine up to one hundred and fifty tons a day, furnishing freight to the railroad (Tr. p. 297); nevertheless The Spreckels Company was constantly subjecting him to criticism and annoyance. Finally, without warning, Graham was summoned to San Francisco (Tr.

p. 271) and immediately upon entering the office of The Spreckels Company, A. B. Spreckels placed before him a note for five hundred twenty-three thousand (\$523,000) dollars, and demanded his signature,—notwithstanding there was a contract which Spreckels had violated, to finance the building of the railroad to Roseburg, on an open account, and keep Graham as manager of the mine. Graham protested against the breach of faith, stated that Spreckels evidently intended to supplant him at the mine, deprive his railroad of all income and force him financially to the wall. A. B. Spreckels protested that nothing of the kind was intended and, after an adjournment of the meeting, promised that Graham should not be disturbed as manager of the mine but should have his employment continued.

Graham demanded to know whether the signing of the note would affect the contract by which Spreckels had agreed to finance the completion of the road to Roseburg and was assured that it would not affect the contract in any way but would merely transfer an open account to a promissory note. Graham protested that it would be utterly impossible to pay the interest monthly as provided in the note and stated further that his entire income was to be developed from the railroad. A. B. Spreckels thereupon assured Graham that the interest would not be required monthly and that he could have such time as he required, would not be forced to pay the interest monthly, would not be disturbed in the operation of the mine, and that the income which he received

as salary from the mine would not be interfered with.

Graham protested that he would not sign the note unless given at least two summers to develop the mine, which meant at least an extension of six months to a year. A. B. Spreckels then, as a further inducement to the signing of the note, promised to deliver to Graham the 2500 shares of stock standing in Graham's name on the books of the Beaver Hill Coal Company and to deliver back the life insurance policy on Graham's life then held by Spreckels and to extend the note six months, if desired (Tr. pp. 280-283). A. B. Spreckels stated that the policy and stock were locked up in the safe and urged Graham to return to Marshfield, stating that he would forward the policy and stock by mail (see the history of this entire series of episodes, Tr. pp. 271 to 279).

Of this note for \$523,162 only \$306,151 was for cash advanced. The remainder—\$217,011—was for bonus, commission, and interest on bonus and commissions compounded quarterly! In other words, where one thousand dollars was advanced to Graham, a commission or bonus for making the loan was charged at the same moment and then interest compounded on the whole (see testimony Treasurer Gibson, Tr. p. 629).

Thus while Graham was furnishing \$240,000 of his own funds, plus \$200,000 in property Spreckels was advancing only a trifle over \$306,000 and was to

be repaid out of Graham's securities in spite of the fact that they had broken every contract under which the company secured these securities.

Upon the signing of this note, events disastrous to Graham swiftly followed. Graham met A. B. Spreckels and John D. Spreckels in their office the next day. A stormy meeting ensued; Spreckels having secured Graham's signature to the note, had entirely changed front, *and demanded a cancellation of the contract with Graham and his resignation as manager of the Beaver Hill Coal Company.* The meeting resulted in nothing, Graham refusing to surrender his contracts and finally, A. B. Spreckels demanded that Graham make an estimate of the amount necessary to complete the development of the mine. Graham returned and gave to A. B. Spreckels his estimate, which was \$65,000. Thereupon, A. B. Spreckels *agreed that there should be advanced for the completion of the mine, \$65,000; that Graham should be confirmed in the management of the mine for at least a year and have the proceeds of his Beaver Hill stock.* A. B. Spreckels directed Graham to have attorney Deering draw up the memorandum of agreement. This was done, approved by Spreckels, who stated that it would be signed immediately on the return of his brother, and he directed Graham to return to Marshfield. This Graham did. Immediately on Graham's departure, Mr. Samuels, Secretary of The J. D. Spreckels & Brothers Company, interfered and *he and A. B. Spreckels decided to repudiate the contract and*

all the promises made, and as Graham landed at Marshfield there was delivered to him a telegram from Spreckels informing him of a special meeting of the Beaver Hill Coal Company in San Francisco, followed immediately by a letter notifying him of the meeting (see history of entire transaction, Tr. pp. 279 to 291).

Witness Samuels testified (Tr. p. 603):

“If Mr. A. B. Spreckels had promised to advance sixty-five thousand dollars to Mr. Graham and had agreed to keep him in as manager for a year, you know I would have killed it if I could. *As a matter of fact I did kill such a contract, otherwise it would have been signed.* I recall that that was in connection with a contract drawn by Mr. Deering” (see again Tr. p. 622).

Graham realized that Secretary Samuels, who was hostile, had succeeded in “killing” the contract (Samuels admits this, Tr. p. 603), and persuading Spreckels to violate all his agreements, and wrote The Spreckels Company saying that he fully realized that it was their intention to oust him from the mine and that if he had to yield, he would do so without contest (Tr. pp. 290-291).

Spreckels repudiated the entire agreement and all inducements by which he had forced Graham into the signing of the note for \$523,000 (see Graham’s letter to Spreckels stating the facts, Tr. p. 453). The agreement to deliver the life insurance policy and the Beaver Hill stock was repudiated and Spreckels has ever since continued to hold the

life insurance policy and is, today, litigating for its proceeds, notwithstanding the original agreement by which it was to become Graham's property if it matured during his lifetime, and the second agreement to deliver it back. Likewise, the entire series of inducements to the signing of the note were boldly repudiated (Tr. p. 472). Graham had no warning he was to be discharged and cut off from his salary. His policy for his wife thereby failed and Spreckels retained the other (Tr. p. 472).

Spreckels had planned, during the whole time, to first get Graham's properties tied up under the collateral note for \$523,000, under any inducement, and then break his promise and discharge him. John D. Spreckels (Tr. p. 544) testified:

"At the time I demanded the execution of this note, I was aware that the name of my firm was signed to certain contractual obligations. I did not know about all of them. * * * *I nevertheless ordered personally, the making up of this note. I knew at the time I sent Mr. Chandler up there or authorized Mr. Samuels to send him up there, that the major portion of the freight furnished to the Coos Bay Railroad was supplied by the Beaver Hill Coal Company.* * * * *At the time the mine was shut down I knew it necessarily would cut off a large part of the income of the Coos Bay Railroad.* * * *"

and at page 551 John D. Spreckels testified:

"At the time I gave Mr. Samuels instructions to draw up that note and have it signed, I think *about the same time I also advised him that Mr. Graham was to be removed.*"

and at page 552 John D. Spreckels testified:

“ * * I will admit that at the time I wanted this note drawn up, I had in mind the discharge of Mr. Graham either at that time or immediately after. At any rate, at the time I drafted the note or ordered the note to be drafted, I sure had in mind the removal of Mr. Graham.”*

Graham was then confronted with the following situation: Without coal furnished as freight, the railroad would be without an income. Spreckels Brothers had the only steamers for carrying coal and they were threatening to remove the steamers and leave his mine and railroad isolated. They had control of all of the distributing agencies in San Francisco and Graham knew that if he did not yield he would be utterly ruined at once. Graham never expressed any intention to resign, but at a meeting of the board of directors on December 3, 1897, Graham was removed and all his powers of attorney and contracts with the mining company were canceled and W. S. Chandler, who had been sent originally to the mine to spy upon him and undermine him, was appointed in his place, and Graham was directed to surrender everything to Chandler. Graham, anxious to preserve the road by securing a continued output of coal, threw no obstacles in Chandler's way but yielded to the inevitable and gave him every assistance (see Tr. pp. 290 to 295).

Three weeks after being removed as manager of the coal mine, Graham went to San Francisco and

paid the interest to date on the \$523,000 note (Tr. p. 295) and in the following month, Graham, while in San Francisco on the way to New York, where he had an interview with Mr. Huntington by which the Southern Pacific became interested in the project of taking over the railroad, met A. B. Spreckels. *Spreckels thereupon demanded that Graham turn over the management of the road and threatened Graham that unless he immediately surrendered the railroad to The Spreckels Company, the latter would shut down the Beaver Hill coal mine, deprive the railroad of all of its freight and put Graham out of business* (Tr. pp. 295 et seq.).

Graham protested that he had put in seven years of bitter work and a large fortune of his own. Spreckels demanded to know how much Graham would take to sell out and offered Graham \$300,000, which he refused. Graham went on to New York and immediately after he left, Spreckels, true to his threat, *shut down all operations* of the mine, thereby robbing the railroad of eighty per cent of its earning capacity (Tr. pp. 296-7). At the time of the shutting down of the mine, a vast body of coal was in sight and Graham had been sending out 150 to 200 tons of coal a day (Tr. p. 297). From the moment of his removal *Graham was shut off from all salary and income from the mine, and was deprived of all his earning power. Spreckels refused to abide by his agreement to return Graham's life insurance policy and the Beaver Hill stock* (Tr. pp. 328-9). The shutting down of the railroad deprived the railroad

company of any power to earn money, and rendered it impossible for Graham to pay from that source any interest on the \$523,000 note, exactly as Graham had prophesied, in the stormy meeting with Spreckels (Tr. pp. 272 et seq.).

Graham had, up to this time, devoted seven years of heavy labor without salary or reward in the building of the Coos Bay, Roseburg and Eastern Railway; had served absolutely without salary from the railroad; had put into the construction of the railroad itself about \$240,000 of his own funds; had delivered over all of his subsidies and Marshfield lands; had turned over all of the rights to the Beaver Hill coal mine, and spur railroad on which he had expended \$40,000 of his own money and performed enormous labor in developing these properties (Tr. p. 258), and was receiving only \$150 per month, which was not sufficient to pay the living expenses of his family, and which had to be augmented by his wife taking in boarders; and was to receive the payment of the premiums on the two life insurance policies. The policy in favor of Mrs. Graham had to be abandoned because Spreckels shut off all of Graham's income; and the other policy, Spreckels, despite his contracts, converted to his own use and still holds in litigation in the federal Court at San Francisco.

Notwithstanding The Spreckels Company had forced Graham out of the mine which he was honestly developing at enormous personal sacrifice, in return for a miserable salary of \$150 per month,

Chandler was permitted to shut down the mine absolutely, *and draw a salary of \$4,000 a year.*

Spreckels' secretary testified (Tr. p. 623):

"We did not care what Mr. Chandler was doing up there while we were paying him \$4,000 a year. * * * We put \$300,000 into this mine, No. 2, after Mr. Chandler went up there. Mr. Graham shipped us 93,000 tons of coal; allow 95,000 tons from September, 1894."

Later this same Chandler was made by Spreckels, receiver of the Coos Bay Railroad, forcing Graham out, and he was paid as receiver \$200 per month or \$2,400 a year, for a railroad from which they had shut off the freight, and was receiving \$4,000 from a mine which they had closed down, *making \$6,400 a year for doing nothing but carrying out Spreckels' policy of ruining Graham. In all, this man Chandler received \$6,400 a year for seven years, or \$44,800 for doing nothing except carry out the vengeance of The Spreckel's Company* (see testimony of Chandler, Tr. pp. 570 and 568).

Graham, on being threatened by Spreckels with the shutting down of the mine, hurried to New York for a conference with Mr. Huntington of the Southern Pacific Company, at which he hoped to induce Huntington to take over the railroad and relieve the situation. The conference failed of accomplishment and Graham returned to Marshfield. He found that the shutting down of the mine had ruined the railroad and it was necessary to reduce expenses to the lowest possible amount. Spreckels'

action had taken the traffic from the railroad, just as Graham had told Spreckels that it would (Tr. pp. 298-301). Graham, having been shut off from other avenues of work, had purchased a cargo of logs on the Coquille River (Tr. p. 300), and had chartered a vessel through The J. D. Spreckels and Brothers Company and shipped the cargo of lumber to Spreckels Bros. Commercial Co. at San Diego. This cargo of lumber amounted to about \$6,000,—more than enough to pay Graham's interest on the \$523,000 note to November. Graham wrote to ask them to put the amount to his credit. Pursuant to the Spreckels' plan to ruin Graham, they refused to put this amount to Graham's credit and falsely claimed that the fund belonged to Spreckels (Tr. pp. 300-301 and 310-311).

Concerning this, even Samuels, secretary of The Spreckels Company, had to testify as follows (Tr. p. 613):

“When he become sixty days in default on a disputed payment of interest on the note, I launched suit against him for the foreclosure of his securities after sixty days. We could have done it in thirty days. We had a reason for doing it then. At this time, Mr. Graham had a dispute with me as to whether or not there was a credit in our hands for the logs shipped to the Spreckels Bros. Commercial Company. We had collected that money from the Spreckels Bros. Commercial Co. and would not pay it to him on his note.”

Samuels then admitted his inability to show that the logs were not Graham's (see Tr. p. 614).

Spreckels then swiftly closed in on Graham and the correspondence between Graham and E. F. Preston, the attorney for The Spreckels Company, appears in the transcript (pp. 303-312). Spreckels demanded an accounting of Graham in a broad and general, but threatening letter (Tr. p. 303), and responding to the reply, Spreckels' attorney wrote as follows:

“It would not be seemly for me to use, in a communication to your firm, the technical designation of the acts which we called in our last communication a diversion, and we do not propose to waste any time with Mr. R. A. Graham or his man Hassett (Hassett was Secretary of the railroad under Graham) concerning the situation that the principals meet. *The street is very broad which leads to the office of J. D. Spreckels & Brothers Company and to the office of the Beaver Hill Coal Company. There is no objection to Mr. Graham traveling it if he so desires*” (Tr. p. 304).

The Spreckels Company, through its attorney Preston, however, charged Graham with all manner of defalcations, embezzlements and the like (Tr. p. 619).

(It may be here proper to advert to the fact that at the trial in the Court below, not a syllable of testimony was offered proving that Graham ever diverted a single cent of money and Graham testified flatly that no such proof had ever been made. On the contrary, some testimony was offered of a vague nature, relative to certain items that could not be understood, but all of which were clearly ex-

plained by Graham. In fact, a large part of the defendants' case in the Court below consisted in the reading of an enormous bulk of collateral affidavits which had been introduced in other trials pending between the parties at the time of the controversy we are now discussing. These affidavits were filled with all manner of glaring generalities, unsupported by truth. While counsel for the defendants never clearly stated the purpose of reading these, it is assumed that it was for the purpose of attempting in the absence of evidence or proof, to besmear the character of Graham. Finally, upon being pressed for the theory upon which they were offered, over objection, Mr. Dunne, attorney for defendants, stated that they were for the purpose of showing good faith in the oppressive acts imposed upon Mr. Graham. Instead of showing good faith, they merely accentuated the force of Graham's charge that he was harassed and oppressed by his creditor Spreckels, who insisted on driving him to the wall to wring from him the property which had been built up as the result of his efforts.)

In response to the charges of embezzlement and threats of litigation, Graham was compelled to write on April 11th (Tr. p. 305) that he had no recourse in view of Spreckels refusing to credit him with the money and threatening him with actions but to commence a suit for the protection of himself and his creditors. He said:

“In view of the obligations that have arisen in consequence of your shutting down the mine

and failing to carry out your contract with me to furnish money to operate and maintain it, I have been advised by my attorney here to commence action to protect my interest as well as that of my creditors in this term of court commencing May second."

He thereupon urged an adjustment of differences by arbitration or otherwise, to prevent further trouble.

In response, Spreckels wrote, using this language (Tr. p. 307):

"It is not our intention that this matter shall go without attention and we will try to convince you before we are through that we not only know our rights but that we are abundantly able to maintain them. *Had you offered any reparation, surrendered all the properties in your hands, and thrown yourself on our generosity, we would have been disposed to consider the past more leniently, but you do not appear to comprehend this view of the situation.*

I am, Very respectfully yours,
JOHN D. SPRECKELS."

Concerning these veiled illusions to diversions of funds Graham testified (Tr. p. 306):

"I will interrupt to state that J. D. Spreckels Bros. & Co. never produced any evidence that I had ever diverted a single cent of the company's moneys from its affairs. They never produced any evidence to me or in any court that I had ever diverted to any use any money that was sent to that company for a specific use. No case ever commenced by them on any of these proceedings ever went to judgment against me."

Graham's books were kept by accountants and were regular and correct in every way (testimony of Hobbs, Tr. p. 502, and Marsden, Tr. p. 495).

Graham went to San Francisco to attend a meeting of the board of the Beaver Hill Coal Company and assert his rights but they refused to even see him (Tr. p. 309). Quickly following Graham's visit to San Francisco, Spreckels closed in on him in a series of suits designed to accomplish his complete personal and financial ruin. First of all, notwithstanding Graham had to his credit in Spreckels' hands, moneys more than sufficient to pay the interest on the note for \$523,000, which Graham had ordered placed to his credit and which had been the subject of correspondence (Tr. p. 310), The Spreckels Company commenced foreclosure action on all of the collateral and securities under the \$523,000 note (Tr. p. 302). Almost at the same time, The Spreckels Company, through the Beaver Hill Coal Company, commenced an action June 17, 1898, in San Francisco, charging Graham with fraud and embezzlement (Tr. p. 312) and immediately lurid articles appeared in the San Francisco Bulletin, copying the sensational allegations (Tr. pp. 313-319). Graham, at that very moment, was attempting to rescue himself from his financial straits by financing what was known as the Klondyke mine, being an individual mine which Graham developed and to which he built a railroad after being forced by The Spreckels Company out of the Beaver Hill Coal Company. Mr. Graham was engaged

in the business of financing this mine and had appointments with Mr. Henry Allen of the firm of Allen & Lewis. The day before the conference was to take place, the articles in the San Francisco Bulletin which had been forwarded by The Spreckels Company to Beaver Hill, were nailed on the stumps and posted on the windows of the Beaver Hill Coal Company's store and were spread broadcast throughout the country. Mr. Allen thereupon announced that Graham's credit was ruined and all matters came to a standstill (Tr. p. 313). This was done designedly by The Spreckels Company to ruin Graham's remaining credit. The Bulletin article, with its wild and sensational allegations, appears on pages 315-317 of the transcript. Concerning these statements Graham testified: "None of those charges against me were true." Even Samuels, the bitter and vindictive secretary of The Spreckels Company, was compelled to testify: "I couldn't prove that one thing that J. D. Spreckels & Brothers Company ever paid for ever went into Mr. Graham's private account over to the Klondyke mine" (Tr. p. 610).

In the complaint in the suit referred to in the Bulletin article, the Beaver Hill Coal Company made a sweeping claim for a judgment of \$200,000. At the same time, the Examiner published an article which was introduced in evidence, from which we quote Graham's interview as follows as an admirable summary of facts actually adduced and unrefuted at this trial (Tr. p. 318):

“Mr. Graham says this suit is instigated with a view to injuring his credit in engineering a deal to control about nine thousand acres of coal land adjoining the 480 acres of the Beaver Hill property. ‘I was the original owner of the Beaver Hill mines,’ said he, ‘and I still own a half interest. In 1894 I went in with the Spreckelses, they agreeing to supply the funds needed to develop the mine. The mine has not paid but it is immensely rich and I believe they are trying to freeze me out and get entire control. I have never misappropriated one cent. I got out last December and went East. In February they shut down working the mine. On June 7th I had a receiver appointed, bringing suit against the company to compel them to work the mine.

‘I own the railroad leading to the mine, having borrowed \$523,000 from the Spreckelses to build it. This money is not due until next November, yet on June 13th they sue me for that amount. When the mine is not working, the road does not pay. They evidently want to control the whole works. My accounts are not one dollar out of the way. If they are, why don’t they have me arrested? Mr. Deering is my attorney and will show up the whole matter in court.’ ”

Continuing, Graham testified:

“That case was never tried. There was no truth in any of the charges brought against me in that complaint as stated in this article” (Tr. p. 319).

The Spreckels Company then sent attorney Frank Powers to Marshfield to demand the transfer to J. D. Spreckels and Brothers Company of the 10,001 shares of stock held by Spreckels, under

the pledge of the note, and it was refused (Tr. pp. 319-320).

Without Graham's consent, The Spreckels Company nevertheless transferred all of Graham's stock in the Beaver Hill Coal Company to A. B. Spreckels, and Graham was, without notice, removed as a director (Tr. p. 323).

The suit for the foreclosure of the securities under the \$523,000 note came on for trial. Graham was in bad financial condition. He was borrowing money to carry on his little mine in Oregon known as the Klondyke Mine, to keep the railroad going and to fight the Spreckels' law suit and pay expenses (Tr. p. 328).

Spreckels, having broken his agreement to deliver back the life insurance policy and the stock in the Beaver Hill Coal Company, Graham's only property free from incumbrance during this litigation was his remaining shares in the Coos Bay Railway and his little Klondyke Mine, which was an undeveloped property (Tr. p. 329). To fight to sustain his rights, Graham found it necessary to borrow \$70,000 from the Crocker, Woolworth National Bank of San Francisco, giving them notes and all his remaining stock in the railroad company and in the Klondyke Mine (Tr. pp. 329-331).

The foreclosure suit went to trial, was bitterly contested, and, as a result, an adjournment was had with a view to procuring a settlement. During the adjournment, Graham took the whole matter up

with Collis P. Huntington, president of the Southern Pacific Railroad Company, at his office (Tr. p. 334). Huntington advised Graham to get a six months' agreement and within that time Huntington was to furnish \$550,000 to clear up the entire situation and take over all the properties of Graham.

Graham testified (Tr. p. 335):

“I came to a settled and fixed understanding with Collis P. Huntington, President of the Southern Pacific Railroad Company, as to what that company and Mr. Huntington would do in the way of an arrangement with me. This understanding was the result of a great many discussions that had run over two or three years or maybe more. The discussions were ended up with the conclusion of Mr. Huntington that we should take six months. He stated his conclusions to me. The arrangement was that the Southern Pacific Company was to guarantee the interest and principal of these bonds; that guarantee would sell the bonds at 95, of the first bonds that were issued at this time, 620, I was to turn those over to the Southern Pacific Company, for which they would advance me \$550,000, the amount we agreed upon to pay the Spreckelses, and then the balance coming to me out of the bonds would be given me as fast as the bonds were sold, and we had the assurance of Mr. Marsden, who was the President of the Farmers' Loan and Trust Company at that time, that the bonds would sell for 95 with this guarantee. In addition to that, we were to make a contract with the Southern Pacific Company, agreeing to deliver them all of the freight that we could gather in the territory of the Coos Bay Company, at Roseburg, at a fixed division or rates; we were

to furnish them coal at Roseburg from the Beaver Hill mine at \$3.00 a ton. It was two or three or four days prior to the signing of this agreement of June 8, 1899, that I came to my final settlement with Mr. Huntington, as I have just testified" (Tr. pp. 335-6).

This agreement having been arrived at, the Southern Pacific Railroad Company had Mr. Graham's affairs placed in the hands of Mr. John Garber, who advised him concerning his rights.

Having, therefore, secured an agreement with the Southern Pacific Company and Mr. Collis P. Huntington, by which the latter were to put up the \$550,000 within six months, Graham had devised a plan by which he could escape from the clutch of his creditor, The Spreckels Company. The contract, however, was only made after Graham had been financially ruined, driven to the wall, and repeatedly sued; had all his physical properties involved in litigation and was likewise being threatened with all manner of civil and criminal prosecutions by E. F. Preston, the Spreckelses' attorney.

The deposition of W. L. Pierce, attorney associated with Mr. Preston, for The Spreckels Company, which appears at page 474 of the transcript, was taken on behalf of the defendants. Pierce makes clear that Spreckels' attorney was threatening all manner of criminal actions against Graham (Tr. p. 478); likewise, Samuels, secretary for The Spreckels Company, testified (Tr. p. 619):

"In the making of the agreement of June 8, 1899, he was threatening Mr. Graham that

he would send him to jail on two or three criminal charges; we were expecting he would. * * * and we were threatening him with embezzlement and with perjury and with other crimes; everything up to larceny; it might have included larceny; it did include embezzlement and included perjury. * * * My impression was there were two suits about the same time,—one for foreclosure and the other for accounting. Mr. Preston was hurling charges at Mr. Graham on the witness stand. We charged him in another case with a hundred thousand embezzlement. It was written up in the San Francisco Bulletin."

As a result of his financial straits, brought about by the repeated breaches of obligation on the part of Spreckels, the numerous suits which had destroyed his credit and taken from him his whole income, Mr. Graham,—harassed, oppressed, coerced and driven to the wall,—was compelled to make a settlement which he entered into June 8, 1899. He was compelled to make the best arrangement that he could with Collis P. Huntington and the Southern Pacific Railroad Company, and finding no escape, Mr. Graham entered into this final agreement which is set forth as an exhibit to the amended complaint (Tr. p. 46), and to this brief (see Exhibit A).

Graham's purpose was to secure time to pay in the money promised him by the Southern Pacific Company and thereby redeem his fortunes.

This contract Graham was advised by his counsel, Judge John Garber, was a mortgage and in no

sense a sale or forfeiture of his properties (Tr. p. 339). And before signing the contract Graham personally struck out all clauses providing for indorsements of stock and transfers of title because he refused to sign anything which would convey away his property or prevent his redeeming (see Graham's testimony, Tr. p. 338).

By this agreement, Graham not merely delivered up into the hands of the Bank of California all securities and properties which he had theretofore delivered as collateral to John D. Spreckels & Brothers Company, *but he likewise delivered up other properties which had never theretofore been in the possession of Spreckels, namely, all ownership in what was known as the Klondyke Spur Railroad, which had been built by Graham to connect with an adjoining mine at a cost of at least \$25,000* (Tr. p. 348). *During all these negotiations Spreckels knew that the \$550,000 was to come from the Southern Pacific Co. He so informed them* (Tr. p. 339).

We have thus traced the coercive process by which Graham, an oppressed creditor, was driven into the making of a contract by which he was given six months further time within which to redeem his securities and by which he placed in the hands of a third party the properties not theretofore pledged and which by the provisions of the agreement, if not redeemed in six months, were then to be transferred over to the creditor.

In all the experience of the writer of this brief no case, either in the courts or in the books, can be

compared with this for cold-blooded, relentless and systematic crushing of a debtor. Every contract that stood as an obstacle to the plan of pillage was a "mere scrap of paper". And more remarkable still, R. A. Graham's testimony, fortified by entries in his diaries extending over many years, and supported by documentary proofs, was *not denied or assailed in a single essential particular*. Of the Spreckels Brothers only one appeared, and he only to confess his forgetfulness and utter indifference to the ruin his breaches of faith had wrought. His subordinates who testified exhibited venom but could supply no facts.

HISTORY OF THE PROCEEDINGS FROM JUNE 8, 1899, TO THE SALE BY SPRECKELS TO THE SOUTHERN PACIFIC.

The six months provided by the instrument within which Graham was to pay \$550,000 elapsed. Graham did not pay the money. The reason he did not pay it was because Spreckels & Co., through its attorney, violated its obligations *and secretly and fraudulently caused the Southern Pacific Company to abandon its agreement to furnish the \$550,000 under the promise that by refraining from making the payment, Graham would be unable to redeem; Spreckels would acquire the properties and thereafter sell the properties under a suitable arrangement to the Southern Pacific Company.*

This fraudulent scheme was consummated in the following manner:

Immediately after the agreement of June 8, 1899, was executed Graham, who had theretofore carried on all of his negotiations with the Southern Pacific Company through Collis P. Huntington, who had made a distinct and binding agreement for the Southern Pacific Company, in the absence of Collis P. Huntington, took up the matter with George Crocker, vice-president of the Southern Pacific Company. Crocker had a preliminary discussion; thereafter, he had a second conversation with R. A. Graham, in which he informed Mr. Graham that Spreckels' attorney, Mr. Preston, had warned him not to furnish the money; had told him that in case the Southern Pacific purchased, it would merely be buying into a series of law suits with Spreckels; that if he would refrain from advancing the money, Graham would be unable to redeem the properties and after the expiration of the six months Spreckels and the Southern Pacific Company could make their private deal (see Tr. pp. 341 to 344).

Thereafter, Graham went to New York and took the matter up with Collis P. Huntington. On his arrival in New York, Huntington informed Graham that the situation had changed; that Spreckels' lawyer, Preston, had destroyed the entire plan of operations by his conversations with Vice-President Crocker and had either frightened or induced the latter into an abandonment of the agreement (Tr. p. 345); Huntington, however, was desirous of making every effort to carry out his contract, and

gave Graham letters to Speyer & Co., London, by which it was hoped that the London bankers might be induced to produce the money for the fulfillment of the contract. These negotiations failed and Graham returned to New York. He and Collis P. Huntington had extended interviews with Russell P. Sage, all of which are given by the faithful report of Graham's diary (Tr. p. 346).

Owing to the hostility of Vice-President Crocker, which had been brought around by the duplicity and bad faith of Spreckels Company, through its lawyers, Graham was unable to secure the money, and the six months elapsed (Tr. p. 347). Before the time elapsed, Graham wrote to the Bank of California, notifying the bank not to turn over the documents to Spreckels & Brothers (see Diary, Tr. p. 347). A copy of this letter was retained by Graham and sent, with his files, to Marshfield, where it was subsequently seized by the Spreckelses' emissaries, when they took over the railroad by force.

The agreement of June 8, 1899, provided among other things, that *at the end of six months* the stock in the railroad should pass to the Spreckelses in case of failure to pay. Graham had refused, in drawing the agreement, to indorse any stocks because he contended that he was not to transfer title, and he excised all clauses to that effect (Tr. p. 338).

As an indication of the extreme measures to which Spreckels was determined to go to secure

Graham's properties, the following is established by the evidence:

Chandler, the same witness who supplanted Graham and received \$4,000 a year for shutting down the mine and keeping it closed, plus \$2,400 a year for overseeing a railroad which they had deprived of its freight, was placed at the head of a band of plug-uglies and officers armed with rifles, at Marsh field, *to await the expiration of the six months period* (Tr. p. 509). Their purpose was to seize the road by force the instant the six months expired. This they did, entering the premises with guns and taking over the books, papers and effects, and forcing the secretary out of the office (Tr. pp. 509 and 496).

There being no board of directors left in office and in the control of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, the defendants Spreckels, who were about to consummate their deal by selling to the Southern Pacific Company, unlawfully reconstructed the board of directors in the following manner, as shown by the minutes of the board. They held fictitious meetings with no one present but J. W. Bennett, who wrote up the minutes from meeting to meeting saying that he had "adjourned himself", and then a fictitious transfer of stock was made, and an illegal board, thus elected, completed the "sale and transfer".

From the time that the Bank of California delivered over the papers at the end of the six

months period, in the face of Mr. Graham's protest (Tr. p. 347), a series of three events took place:

1st. The Spreckels Company, through its man Chandler and his armed men, seized the Coos Bay Railroad and the offices of the company (Tr. pp. 509-496).

2nd. A series of suits was commenced against Graham and others, as follows:

(a) J. D. Spreckels & Brothers Company v. R. A. Graham and others, and the Coos Bay Railroad, to bring about the reorganization of the railroad;

(b) Farmers' Loan and Trust Company, as holders of the bonds, against the Coos Bay Railroad Company, in which action Graham intervened to assert his right to the stocks and bonds in question here.

Inasmuch as in these suits, the plaintiff, Graham, signed certain stipulations and an answer (which will be hereafter explained), which are relied upon as matters in estoppel, the following testimony becomes material (Tr., commencing at page 369):

From 1902 until 1906 Mr. Graham was continually in negotiations in New York looking to the redemption of his property and its rescue from the grasp of The Spreckels Company. He first presented the matter to Mr. Harriman, president of the Southern Pacific Company, and asked him to take up the negotiations where they were left off by Mr. Huntington, who died about the end of 1900 (Tr. p. 369).

Mr. Graham gave Harriman the profiles of the railroad for examination (Tr. p. 370). Mr. Graham had many conferences with Mr. Couch Flanders, representing the opposition to him, with Mr. Wood of the firm of Williams, Wood & Linthicum (Tr. p. 370), and all of the attorneys representing the Spreckelses' interest were in conference with Mr. Graham's attorneys, looking to a settlement (Tr. p. 370).

During the year 1904 Mr. A. B. Spreckels was in New York and he sent a man by the name of George Crouch, a Wall Street broker, to Mr. Graham, and entered negotiations with a view to settling the ownership of the property (Tr. p. 370).

In 1904, likewise, Mr. Preston, attorney for The Spreckels Company, was in New York, and the matter of a settlement was likewise discussed, with a view to getting everything reorganized so that the railroad could be sold, and "so that everybody would get their money" (Tr. p. 371).

In this, Mr. Preston seems unqualifiedly to have admitted that Graham had claims which were unsatisfied and unsettled. With a view, therefore, to a settlement, Mr. Graham was persuaded to sign certain stipulations for the dismissal of pending actions in which he was involved and which involved the ownership of the Coos Bay Railroad properties. This was done after conferences looking to a settlement (Tr. p. 372).

During all these negotiations with the representatives of The Spreckels Company, with Harriman and

others, Mr. Graham was urging his right to the stock and bonds of the Coos Bay Railway and other properties. He says:

“I was urging a discussion relative to the stocks and bonds of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company and other properties described in the contract of June 8, 1899, was that Mr. Spreckels had had an interest in this property of \$550,000, with interest, from the commencement, from the date of that instrument,—that whatever other values were in the road were mine and that whatever the road could be sold for, first Mr. Spreckels should have his money, \$550,000 and interest,—and the balance of the money I claimed all the time was mine” (Tr. p. 370).

Mr. Harriman, president of the Southern Pacific Company, was fully informed of all Graham's claims. Mr. Graham discussed the matter fully with Mr. Wood of Portland, attorney for The J. D. Spreckels & Brothers Company.

As a result of these various interviews with the representatives of The Spreckels Company, it was finally agreed that Mr. Graham should sign certain stipulations by which the pending litigation might be disposed of and the way be cleared for a sale of the properties to the Southern Pacific Company. Mr. Graham signed the stipulations and they were forwarded to Portland and filed in the actions, but were never acted upon, and no decree was entered in accordance therewith but the actions were simply dismissed (Tr. pp. 364-369). It was evidently the purpose of Spreckels to get the stipulations, not

that he might get judgment but might escape litigating Graham's claim by dismissing.

Thereafter, having secured the disposition of this litigation through the assistance of Graham, *who was relying on the promise of a settlement*, The Spreckels Company sold out the property to the Southern Pacific Company for the sum of \$1,300,000 (Tr. p. 560), although John D. Spreckels could not even remember the amount and stated repeatedly that he candidly believed he sold for a million (Tr. p. 557).

Mr. Wood of the firm of Williams, Wood & Linthicum, was representing The Spreckels Bros. Co. had been evidently hopeful of securing a settlement and having heard of the sale to the Southern Pacific Company, Mr. Wood finally told Mr. Graham that the Spreckels people would not settle and that it would be necessary to fight it out in court (Tr. p. 338).

On this subject, Mr. Graham testified as follows:

"I never received anything for the signing of these stipulations. After the stipulations were sent out here, I discovered some time in the fall of 1906—it was reported to me from Marshfield in a general way that the road had been sold out to the Southern Pacific Company. Subsequent to the sale to the Southern Pacific Company, I had a discussion concerning my rights with Mr. Wood, who had been representing the Spreckels' interests. I think I saw Mr. Wood in New York twenty times at the various discussions and it always was with the view of a settlement, for him to bring about this settlement in some kind of a form that would be

satisfactory; and I think it was as late as 1907 that he said to me: 'These people won't settle with you. If you have got any claim you have got to go and fight it out in court'. The value of the Coos Bay Railroad was thirty thousand dollars a mile and there was an equity worth twenty-five dollars per share in the stock over and above the par value of the bonds which was six hundred and twenty-five thousand dollars" (Tr. p. 380).

The land at Marshfield was valued at two hundred thousand dollars, and Graham's opinion of the value of his interest in the Beaver Hill Coal Company, conceding that he was entitled to twenty-five hundred shares, was two hundred and fifty thousand dollars (Tr. p. 381).

**THE DEFENSES OF THE DEFENDANTS OUTLINED AND
CONSIDERED.**

The defendants rely upon practically the same grounds of defense, and they may be considered as follows:

FIRST: That the Contract of June 8, 1899, was a Con-
clusive Settlement.

The contract of June 8, 1899, is pleaded as a full and complete settlement of all of the differences between the parties and it is asserted that the contract was a conditional sale and that immediately upon the expiration of the six months period the title to all properties passed absolutely to the J. D. Spreckels & Brothers Company. This theory is diametrically opposed to the construction placed

upon the contract by the plaintiff. It is our contention that the instrument in question, on its face, is a pledge, mortgage and security. This will be argued at length hereafter.

**SECOND: That the Southern Pacific Company was a
Bona Fide Purchaser.**

This defense was not urged in the court below and I trust will not be urged here. The evidence was overwhelming and undisputed that all of the leading officers of the Southern Pacific Company were fully advised of all the terms of the contract and the relations of Graham to the property. In fact, the contract was drawn at the suggestion of Mr. Collis P. Huntington, so that the Southern Pacific Company might advance the money to make the purchase. Harriman, president of the Southern Pacific Company, knew all the details of the controversy, and was informed of all the provisions of the contract of June 8, 1899, and Graham's claims to the ownership of the property thereafter, and negotiated for its purchase with Graham (Tr. pp. 376-377). Furthermore, at the time of the purchase by the Southern Pacific Company there was pending undismissed the receivership suit by Spreckels & Co. against the Coos Bay Railway and R. A. Graham, setting forth most of the elements of Graham's claims. This was not dismissed until 1907. The sale to the Southern Pacific Company was on July 2, 1906 (Tr. p. 367). The original judgment roll in this action was forwarded as an original exhibit.

THIRD: Bar of the Statute of Limitations.

The answers plead many provisions of the statutes of limitations of Oregon and California. The only statute attempted to be urged in the court below was that of the State of Oregon. It was, however, admitted in the court below that The J. D. Spreckels & Brothers Company had never filed its articles of incorporation in the State of Oregon and had never appointed a managing agent therein and had never submitted itself to the jurisdiction of the State of Oregon. This admission was made to avoid the necessity of documentary proof (Tr. pp. 386, 387 and 405).

It is settled law that a foreign corporation cannot plead the Statute of Limitations of a state unless it establishes the fact that it has complied with all the laws of that state by filing its articles of incorporation, appointing a managing agent in conformity thereto and has submitted itself to the jurisdiction.

Until it has thus complied, the privileges of the statute are withheld from it.

Taylor v. Union Pacific, 123 Fed. 155.

The defense of the Statute of Limitations was not urged on the argument in the court below and I trust will not be here.

FOURTH: Estoppel by Stipulation Filed in a Former Action.

It is alleged that in an action brought in the Circuit Court of the United States for the District of Oregon, by the J. D. Spreckels & Brothers Com-

pany against the Coos Bay. etc. Railroad, R. A. Graham and the other directors of that corporation, there was a stipulation signed and filed by the plaintiff, Graham, that his answer therein might be withdrawn and the complainant might have judgment as prayed for in the complaint, except in certain particulars (see said stipulation, Tr. pp. 103-104).

This stipulation was never followed up to judgment against Graham but, on the contrary, the plaintiff expressly refrained from taking judgment and dismissed the action entirely (see the judgment on pp. 107-108, Tr., pleaded in defendant's answer).

Under these circumstances it was held by his Honor, Judge Bean, on a demurrer to the answers pleading this estoppel, in the court below, that such plea in estoppel was not good because—

“There is no averment that any decree was ever entered in the suit brought by Spreckels & Brothers Company against the railroad and Graham in this court or that the stipulation signed by Graham was ever acted upon by either party and therefore such proceeding could not have the effect of an adjudication that the title to the stock was in Spreckels & Brothers Company or estop Graham from contesting that position” (Tr. p. 13, Judge Bean's decision).

Again, in an action brought by the Farmers Loan & Trust Company to foreclose the bonds against the Coos Bay etc. Railroad Company and Graham, the plaintiff, Graham, intervened, and subsequently, under an agreement for settlement, signed a stipula-

tion consenting to the withdrawing of his petition for intervention (Tr. pp. 360, 361 and 362). But no judgment was entered against Graham in this matter and the action was merely dismissed by the plaintiff on the consent of the Southern Pacific Company (Tr. p. 363). These stipulations were entered into under an agreement of settlement (see statement of Mr. McNab, Tr. pp. 360-362).

Moreover, the stipulation was signed by Mr. Graham under the distinct promise that they would enable J. D. Spreckels & Brothers Company to dispose of the pending litigation to the end that the properties might be sold and Graham should receive his money, as well as Spreckels be paid what was justly due him (see Graham's testimony, Tr. pp. 370-371-372-373-374 and 379, undisputed). These stipulations were sent out to A. B. Spreckels and it was duly believed by Mr. Graham that it would lead to the final settlement of the controversy existing between them. However, after securing the stipulations and clearing the records of the suits, the J. D. Spreckels & Brothers Company, as they had done on two former occasions, violated all their promises and engagements and sold the property outright to the Southern Pacific Company without further regard for any of the plaintiff, Graham's, rights thereto (Tr. p. 380).

FIFTH: That Plaintiff Graham has been Guilty of Laches.

The sale by the J. D. Spreckels & Brothers Company took place July 2, 1906 (Tr. p. 4). This action

was brought December 2, 1907,—about six months after the sale. On the demurrer it was held by his Honor, Judge Bean, that the action was brought in time and was not barred by the Statute of Limitations (Tr. p. 13), but plaintiff, not only by his complaint (Tr. pp. 42-44) and by his testimony (Tr. p. 383), but by the testimony of Attorney Wood, formerly opposing him (Tr. p. 675), showed a constant assertion of rights by litigation. As will be shown by the original judgment rolls in the actions of *J. D. Spreckels & Brothers Company v. the Coos Bay Railroad*, judgment roll No. 2933, and *Farmers' Loan & Trust Company v. Coos Bay Railroad Company* and others, judgment roll No. 2934, the plaintiff Graham was asserting his rights by answers and by intervention, and during all of these times was carrying on negotiations under promises by the *J. D. Spreckels & Brothers Company* and its representatives, to settle the litigation (see Graham's testimony, Tr. pp. 369 to 384).

Mr. Graham testified (Tr. p. 383):

“After I commenced this action I have been ready and anxious to proceed to trial. My attorneys were E. B. Watson and Watson & Beekman. So far as I know there has been no delay in this action due to any action on my part. I have never asked for any postponements.”

Graham was constantly in court demanding that his case be tried, and it was the defendants who were seeking postponements. Mr. Graham's lawyer died, leaving no one familiar with the mass of

detail in the case; but he retained new attorneys and insisted on driving the case to trial. All the years from the time that the properties were delivered to the J. D. Spreckels & Brothers Company, Mr. Graham has been litigating this question and endeavoring to get it determined in various actions.

Mr. Wood, attorney for J. D. Spreckels & Brothers Company, testified:

“My memory would be that during this time Mr. Graham never ceased asserting his claim against the J. D. Spreckels & Brothers Company relative to an asserted ownership in the Coos Bay stock and bonds.”

**SIXTH: That Graham Signed a Release of Demands
Against Spreckels.**

During the trial there was introduced in evidence a release which had been signed by R. A. Graham and *dated June 8, 1899*, running to J. D. Spreckels & Brothers Company. It is contended by the parties that this release is a bar to the maintenance of the action.

This release, as a matter of fact, was drawn as one of the large group of papers dated *June 8, 1899*, all of which depended for their vitality upon the carrying out of the agreement of *June 8, 1899*. Mr. Graham testified that this release was one of the many reciprocal releases executed by the parties and intended to be deposited with the Bank of California, there to be held contingent upon the payment or failure to pay the sum of \$550,000 in

six months. There was some testimony offered by Spreckels, however, that this release was delivered between the parties. This was denied by Mr. Graham, who testified that the instrument never was intended to be omitted from the papers deposited with the bank and was not to have any effect except upon the contingencies provided in the agreement of June 8, 1899. There is no dispute that Mr. Graham so testified (see statement of counsel, Tr. p. 673, and testimony of R. A. Graham, Tr. p. 350).

At the time of the execution of the agreement of June 8, 1899, a large number of these reciprocal clauses were drawn and the particular language of some of them is to be noticed on pages 667 and 668 of the transcript, wherein they provide

“this release and disclaimer not to take effect, however, except upon the failure of the undersigned to pay or cause to be paid to the Bank of California”, etc.

Manifestly, this release could not and never was intended to take effect unless the whole escrow agreement of June 8, 1899, was consummated. Otherwise, there never would have been any purpose in drafting the agreement of June 8, 1899. That agreement, itself, provided in clauses “c” and “d” of paragraph 6 (see Tr. p. 50) for the execution of releases by Graham to Beaver Hill Coal Company, the Coos Bay Railroad Company, etc., all of said releases and disclaimers *“not to take effect, however, except upon the failure of the first party to pay or cause to be paid to said trustee, for the use and*

benefit of the second party, said sum of \$550,000''. Manifestly, any additional release would have been without consideration and if, by any accident, said release escaped from the great mass of papers and found its way into the possession of J. D. Spreckels & Brothers Company, it amounts to nothing. Graham testified that he never received anything for such release or any other release and never delivered it and that it was a part of the general plan by which all papers were to be deposited in escrow with the Bank of California.

**SEVENTH: Estoppel by Admission in Former Answer of
R. A. Graham.**

In an action commenced in the Circuit Court of the United States (Judgment Roll No. 2933) by J. D. Spreckels & Brothers Company against the Coos Bay Railroad Company, Graham and others, the plaintiff, Graham, filed an answer through his attorneys, Eidelman & Mitchell. For some reason never understood by Mr. Graham or even known to him until called to his attention by Mr. McNab, in October preceding the trial, this answer contained a statement asserting the positive claim to all of the bonds of the Coos Bay Railroad but admitted that the complainant, Spreckels, owned the twenty thousand shares of stock.

The plaintiff, Graham, testified (Tr. p. 357):

“Mr. C. M. Idleman and Senator Mitchell were my attorneys in that suit at the time this answer was filed and verified by me. I did not understand it contained a statement admitting

that the complainant owned twenty thousand shares of stock in the Coos Bay etc. Railroad. I did not discover that such an admission was in this answer until Mr. McNab told me last year—in the summer of last year—October. My attention was also called that in the same paragraph *I denied that they were the owner of any of the bonds of the railroad.* I did not know that it was in at the time I signed it and read over its provisions with Senator Mitchell. *At that time I was making claim to the ownership of all the stock as well as all the bonds of the railroad. That was my understanding and intentions. If I had known any such provision was in there I would not have signed nor verified it. In the signing of that answer I had no knowledge concerning any admission there as to the ownership of stock being in Spreckels in the same paragraph in which it is alleged that I am owner of all the bonds; and I never saw it or noticed it. I would never have signed any such admission or pleading had I known it was there. I certainly wouldn't have signed it. I had no knowledge as to how it got there and I didn't know it was there until Mr. McNab drew my attention to it. At that time I thought I was asserting my claim to the stock of the railroad as well as its bonds. I was doing it in every way that I could. I had never any other idea but what I owned the stock and the bonds subject to this claim; and why it was put in I have no knowledge. I mean subject to the \$550,000 claim set forth in the agreement."*

Manifestly, the allegation in the answer was due to a mistake of the attorneys. In any event it caused no injury and is not a ground of estoppel because under those stipulations made under a

promise of settlement the answer was withdrawn (Tr. p. 437), and no judgment was taken, but the action was dismissed (Tr. pp. 364-366).

At most, it would be an admission of a conclusion of law which conclusion was erroneous, for Graham was the owner of the stock and still is.

**THE DEFENSE THAT GRAHAM RECEIVED RELEASES FROM
THE BANK OF CALIFORNIA.**

The defendants in the case below produced a receipt purporting to be signed by Mr. Graham to the Bank of California for the delivery to him of certain instruments referred to in the contract of June 8, 1899. The facts are as follows:

Mr. Graham having informed the Bank of California by mail from New York not to deliver the papers to Spreckels at the end of the six months period (Tr. p. 347) came on to San Francisco. On arriving in San Francisco he learned from some source that The Spreckels Company had caused the Coos Bay Railway Company to sue him or was about to sue him, for certain sums of money. Mr. Graham submitted the matter to Judge Garber, his attorney, saying that he could not understand why The Spreckels Company should be claiming that they were acting under the contract of June 8, 1899, and were receiving his properties thereunder and at the same time be maintaining actions against him on behalf of the Coos Bay Railway Company.

And he called to Judge Garber's attention the fact that under the contract of June 8, 1899, there was to be delivered to him a release by the Coos Bay Railway Company of all demands.

Judge Garber told Mr. Graham that he must be quite mistaken and that there certainly could not be any litigation of that character. His office was above the Bank of California and he said to Mr. Graham "You go down to the bank and see the papers or get them" (Tr. p. 351). Graham went to the bank and asked to see the papers. The bank officials asked him to sign a receipt before he took the papers, and believing that it was merely a receipt for the papers which he intended to return, he signed it. The bank official then produced the papers but it did not contain the release required to be delivered over to him by the Coos Bay Railroad (Tr. p. 351). Graham then refused to accept any of the papers and handed everything back, but the receipt on the margin of the book was never wiped out (Tr. p. 352). Graham testified:

"I never received the satisfaction of the judgment for the \$523,000 and odd dollars. I never received anything of value or otherwise from the Bank of California or from Spreckels in regard to this agreement; not one scrap of anything" (Tr. p. 352; see also page 433).

The summary of Graham's testimony with relation to the signing of the receipt and the failure by the Bank of California to deliver the papers claimed for it, is to be found at pages 349 to 353, inclusive, of the transcript.

The only evidence to the effect that Mr. Graham ever received any of these papers is to be found in the deposition of Moulton and the testimony of Daniels of the Bank of California to the effect that this receipt is among their files, but all other records were destroyed. The bank was unable to give any testimony beyond the production of the receipt to the effect that the papers had been delivered to Graham. This was met by Graham's positive denial that he had ever received them and a clear explanation of how the receipt happened to be signed under the circumstances just above mentioned.

IN CONCLUSION ON THE FACTS.

We invite a reading by the Court of Graham's concluding testimony, pages 471 et seq. To show the effect of Spreckels' successive acts, I quote the following simple testimony:

"From the time that I received the letter signed by John D. Spreckels in which he told me that if I had thrown myself upon his mercy and had surrendered to him all my properties, he might have been disposed to deal with me more leniently, I did not do anything to provoke that firm in any way into the actions which they took against me: if I did so unconsciously, I did not know it. *I have never received one dollar for all the years that I put in the Coos Bay Railway.* Other than the salary of \$150 a month that I received while I was there as its manager, plus what they paid on this insurance policy. I have no recollection of ever receiving a cent from the Beaver Hill Coal Company but

that the \$150 a month I received as manager went towards keeping my wife and us, but it was not near sufficient to pay our living expenses. To make out for living expenses my wife kept boarders."

Argument.

THE CONTRACT OF JUNE 8, 1899, IS NOT A CONDITIONAL SALE BUT IS AN INSTRUMENT BY WAY OF MORTGAGE, PLEDGE OR SECURITY. BY IT R. A. GRAHAM DID NOT EXTINGUISH HIS EQUITY OF REDEMPTION. IT RETAINED ALL THE DISTINCTIVE FEATURES OF A MORTGAGE,—AMONG OTHERS, NAMELY, (a) CONTINUED EXISTENCE OF AN UNCANCELED DEBT DURING THE SIX MONTHS PERIOD, AND (b) RETENTION OF TITLE IN GRAHAM WHICH WAS NOT TO PASS UNTIL THE EXPIRATION OF A FUTURE PERIOD DURING WHICH THE DEBT CONTINUED. IT WAS AN ATTEMPT BY A CREDITOR TO EXTINGUISH BY A MERE EXECUTORY CONTRACT A DEBTOR'S EQUITY OF REDEMPTION.

The agreement of June 8, 1899, shows upon its face that it was intended as a mortgage or pledge. By it Spreckels attempted to shut off an equity of redemption by a *mere executory contract*,—that is, by failure to make payment of a sum of money at a given time in the future, and that the indebtedness should continue to exist during the interim. Title was not to pass *until the expiration of the six months period and failure to pay*. No deed to Spreckels was delivered in escrow, but a conveyance was made to the bank and provision was made for passing of title *at the end of the*

six months period by the trustee. As a matter of fact this deed was not made by the Bank of California until several years had elapsed. It is settled law that an equity of redemption cannot be extinguished by an executory contract. In order to shut out the equity of redemption by an agreement subsequent to the creation of the original debt, there must be an executed contract by which (a) *the debt is instantly extinguished*, and (b) *title to all properties passes at once*.

Both on principle and authority, such an instrument could not extinguish Graham's right to redeem his properties. Nor did it pass title upon failure to make the future payment.

Batty v. Snook, 5 Mich. 231;

Holden Land Co. v. Interstate Trading Co.,
123 Pac. 733 (87 Kans. 221);

(This case is more nearly in point than any other adjudication in the United States and is decisive on every question of law and fact involved in the present case.)

Jeffreys v. Hartell, 51 S. W. 653;

Johnson v. Prosperity Loan Co., 94 Ill. App.
261;

Lewis v. Wells, 85 Fed. 897;

Marshall v. Russell, 158 Pac. 141 (Advance
Sheets, July 17, 1916).

It is of course a familiar and undisputed proposition that no force will be given to a stipulation in a mortgage or deed intended as a mortgage by which the mortgagor agrees that if he fails to make

payment by a stated time, the mortgagee shall become the absolute owner of the property.

It is equally well settled that no effect will be given to such an agreement made separately from the mortgage but at the same time (123 Pac. 736). But the decisions now go much further than this and it is a firmly established rule that an equity of redemption which a debtor holds in property which has been pledged or mortgaged as security for a debt *cannot be extinguished by any subsequent executory contract by which the equity of redemption is to be forfeited if the debt or sum is not paid on a future day stated in such contract.*

This principle was first announced with authority by the Supreme Court of Michigan in *Batty v. Snook*, 5 Mich. 231, wherein it is said:

“Once a mortgage always a mortgage, may be regarded as a maxim of the court. Equity is jealous of all contracts between mortgagor and mortgagee by which the equity of redemption is to be shortened or cut off. The mortgagor may release the equity of redemption to the mortgagee for a good and valuable consideration, when done voluntarily, and there is no fraud and no undue influence brought to bear upon him for that purpose by the guardian. *But it cannot be done by a contemporaneous or subsequent executory contract by which the equity of redemption is to be forfeited if the mortgage debt is not paid on the day stated in such contract,* without an abandonment by the court of those equitable principles it has ever acted on in relieving against penalties and forfeitures.”

The contract of June 8, 1899, required all of Graham's pledged securities, *as well as many other properties not theretofore pledged or mortgaged to Spreckels, to be delivered to the Bank of California.* (These are summarized on page 348 of the transcript and included 9,992 shares of railroad stock; the Klondyke spur railroad as well as the disputed Beaver Hill stock and insurance policy.) Graham was given the period of six months in which to pay the sum of \$550,000, upon the payment of which he was to be permitted to draw down all of his properties. By the agreement, a then pending indebtedness amounting to \$523,000, with accumulated interest, *was to be reduced to judgment and this indebtedness thus reduced to judgment was to be kept alive throughout the six months period.* It was only in case of failure on the part of Graham to pay the \$550,000 within six months that title should *at a future time* pass. At the expiration of six months, in case Graham failed to pay, not only the properties which he had theretofore pledged and mortgaged to Spreckels *but also the new properties which he was then for the first time delivering* (Tr. p. 348), were to become forfeit to the creditor, Spreckels. The Court will therefore note that these two features, either one of which is sufficient, indubitably, to stamp the instrument with the character of a pledge or mortgage, were present, namely:

First. The continuance of the indebtedness throughout the entire period of time instead of its being extinguished on the signing of the instrument; and

Second. Title was not to pass to Spreckels on the making of the contract but only at a future time in consequence of Graham's failure to pay his debt.

The clauses making clear these two elements are as follows:

"4. That a judgment shall be at once entered in the suit brought by the second party (Spreckels) against the first party (Graham) now pending in the said Superior Court of the City and County of San Francisco, State of California * * * in favor of the second party and against the first party for the sum of \$523,162.52, together with interest thereon at the rate of six per cent per annum from the first day of April, 1898, both in United States gold coin, and providing for a sale of the pledged securities sought to be foreclosed in said suit, and with the usual provisions for the docketing of a judgment against the first party for any deficiency which may exist after the sale of the collaterals specified in the original complaint in said suit; that all proceedings to enforce said judgment be *stayed* for a period of six months after the date of this agreement."

(N. B. A satisfaction of said judgment was to be deposited *but only to take effect upon future contingencies.*)

"9. That if at any time within six months from the date of this agreement the first party shall pay or cause to be paid to the said trustee, for the use and benefit of the second party, the sum of \$550,000 in gold coin of the United States, the title to all of the shares of stock, bonds, real property, and judgment below mentioned *shall thereupon rest in and the same shall become the absolute property of the first*

party; and said trustee is hereby authorized and directed to *thereupon* deliver to the first party and the second party hereby obligates itself to cause to be *thereupon* delivered to him" the various properties."

"10. Should the first party fail to pay or cause to be paid to the said trustee for the use and benefit of the second party, within said six months from the date hereof, the sum of \$550,000 in gold coin of the United States, *the title to all the shares of stock, bonds, real property and judgment above mentioned shall at the expiration of said six months vest in and the same shall become the absolute property of the second party*; and said trustee is hereby authorized and directed to *thereupon* deliver to the party" certain properties.

It will therefore be seen clearly that the debt was to be kept alive and not to be extinguished except by Graham's making payment. While, at the same time, it was provided that it was only "at the expiration of said six months" that title to the properties should vest.

An instrument containing very similar provisions is discussed with great learning in the case of *Johnson v. Prosperity L. & B. Association*, 94 Ill. App., page 260.

In this action, the complaint prayed that a warranty deed, together with a written contract, be decreed to constitute a mortgage and that plaintiff have the right to redeem. The deed in question was absolute on its face. The contract which accompanied the deed provided in its tenth clause as follows:

“It is expressly understood and agreed by the parties hereto that should said first party fail or refuse to pay to said party the said \$250 * * * on or before two and one half years from the date hereof, *then the title to said premises, certificates of stock and profits in said association shall rest and become absolute in the second party and first party shall have no further right or interest in said premises and certificates of stock or anything arising or growing out therefrom.*

“Time is of the essence of this contract and of all the conditions thereof.”

The Court, discussing the above quoted clause, say :

“The tenth clause, while not a formal condition of defeasance is nevertheless a limitation upon the effect of the deed as an absolute conveyance in that *it provides that it is upon the refusal or failure of appellant to make payment specified that the title ‘shall rest and become absolute’ in appellee.* An agreement to reconvey upon stipulated terms may suffice of itself to make a deed absolute in terms in effect a mortgage; *but a limitation which permits the absolute title to rest only upon the happening of the contingency of a failure to pay could hardly be considered to be other than a mortgage.*

* * * * *

“Here the proviso in effect limits the vesting of absolute title to the happening of a future failure of appellant to make payment specified * * * aside from the other clauses and provisions of the contract * * * we regard this one proviso contained in the tenth clause as making the two sealed instruments taken together, a mortgage. * * * And although it be apparently the intent of the parties to thus

make a mortgage which will cut off the right of the mortgagor to redeem, yet the courts hold that if it appeared to have been intended as a mortgage the right of redemption cannot thus be relinquished."

And commenting upon the fact that the evidences of indebtedness consisting of trust deeds and the like were retained to be canceled upon a future failure to pay, the Court say:

"The very fact of this retention of the evidences of indebtedness and failure to *at once* cancel and deliver them up to appellant would afford strong proof that the instruments in question constitute a mortgage if such extrinsic evidence need be looked to for the purpose of determining their character."

And discussing the admissibility of evidence to determine the character of the instrument, the Court say:

"While it is allowable to resort to extrinsic evidence to determine that a deed absolute on its face is in reality intended by the parties to be merely a mortgage, the converse does *not* obtain, namely, that resort may be had to extrinsic evidence to establish that a deed which is by its terms a mortgage is intended to operate as an absolute conveyance."

Discussing the words which have been so frequently held to be void as an attempt to shut off the equity of redemption, *Jones on Mortgages* says:

"The usual words of the proviso are, that upon the payment of the debt or performance of the duty named 'then this deed shall be void', but any equivalent expression may be

used; and in fact, if it appears from the whole instrument that it was intended as a security, although there be an express provision that upon the fulfillment of the condition the deed shall be void, it is a mortgage. The substance and not the form of expression is chiefly to be regarded."

In *Bearss v. Ford*, 108 Ill. 16, the Supreme Court said:

"Nothing is more firmly established in the law of mortgages than that it is not competent for the parties even by express stipulation to cut off the right of redemption and to permit them to make such an instrument an absolute deed *upon some future contingency* would simply be cutting off the right of redemption which as we have just seen cannot be done."

In *Lewis v. Wells*, 85 Fed., page 896, George M. Mason became the owner of a certain note and mortgage imposed upon property standing in the name of W. M. Bennett. Bennett, the owner, made a deed to Mason, the mortgagee, for the property covered by Mason's mortgage and the parties caused the same to be placed in escrow with an agreement which directed the holder in escrow upon payment by Bennett of certain sums to deliver the deed over to Bennett and upon the payment of the value of the sum due the mortgagee, Mason, to cancel and satisfy the mortgage. It thereupon provided:

"And you are further instructed that on the failure of said William M. Bennett to meet any of said payments at the times mentioned herein * * * that you deliver the enclosed

deed to the said George M. Mason (mortgagee).”

Bennett failed to make the last two payments mentioned and the deed was delivered to Mason who recorded it.

After discussing the questions of fraud and inadequacy of consideration and after holding that

“To insist that what was in fact a mortgage was a deed is a fraud, in equity, and will not be tolerated.”

the Court say:

“Where any condition in writing, no matter how ingeniously worded, accompanies such a deed, it is not only good equity but the part of wisdom for the courts to hear any testimony which will tend to disclose the real facts attending the transaction. The escrow agreement accompanying the Bennett deed to Mason, and parol evidence, having been admitted in this case, let us examine the facts and see whether that deed was intended as a conveyance or as a security for a deed. * * * *The deed was not to be delivered for more than eight months after its execution and only then upon the condition that Bennett should fail to pay the amount secured by the mortgage.* Bennett before executing the deed and escrow agreement was advised by his attorney that it was in effect a mortgage only.”

The Court examining the evidence holds that there was no meeting of minds, that while the mortgagee might have fully intended and artfully designed to exclude any equity of redemption, the mortgagor certainly did not believe he was parting

with absolute title and was advised that his action did not forfeit title. The Court relieved by holding it to be a mortgage.

It will be noted by the Court that when the contract of June 8, 1899, was ripe for signature, Graham insisted upon striking out all the provisions which provided that he should endorse any of his stocks or that title should pass by delivery of any of the instruments (Tr. p. 338). His purpose as stated by him was that he never intended to relinquish title and that he understood that the delivery of these instruments constituted nothing but a mortgage and he was so advised by his attorney, Judge Garber (Tr. p. 339).

By long odds, the most exhaustive and authoritative decision anywhere to be found on the question here involved is that of *Holden Land & Livestock Co. v. Interstate Trading Co.*, 123 Pac., page 734.

Seldom is a series of complicated facts, such as present themselves in this cause, duplicated in another decision. However, in the case just cited, we have a set of facts almost identical with those involved in the case before this Court. There, the papers, instruments and securities which had been the subject of contractual relations between the parties were delivered in escrow and as in the case at bar a given length of time was agreed upon within which the debtor might pay a stipulated sum and upon such payment withdraw his securities and property. It was likewise provided, as in the case

before this Court, that upon the failure at a certain stipulated time in the future, to make the agreed payment, the title to the various securities and properties should *thereupon* become vested in the creditor and the debtor's right thereto should cease.

In all respects, therefore, the decision in question is in line with the facts of the present case. The Supreme Court of Kansas has exhaustively covered the law on the question. The opinion is that of the unanimous Court and in the humble opinion of the writer of this brief is the most exhaustive and authoritative interpretation of contracts which attempt to wipe out by any form of agreement the sacred and solemn right of a debtor to preserve his right to redeem his properties from the grasp of his creditor.

To the careful reading of this most extended opinion, we most earnestly invite the attention of the Court.

By the contract it was recited that the various counter-indebtednesses, instruments, bills of sale, notes, mortgages, etc., should be delivered into the hands of a third party and it is thereupon recited:

“The provision was made that if Holden's notes were paid by July 9, 1904, Patton (escrow agent) should deliver to Holden the notes, the collateral and the deeds; if the notes were not paid on that date Patton should deliver the bill of sale and the deeds to the Trading Company, deliver the Trading Company's note to the bank and surrender Holden's note to

Holden. * * * Final delivery was made as directed in the event the notes were not paid by the date fixed."

We quote from the decision as follows:

"What it in substance amounts to is this: Holden, the mortgagor, and the bank, the mortgagee, agree that Holden is to have until July 9th to pay his debt. If he fails to do so, he is to relinquish all claims to the land and the bank is to become the owner. The Trading Company's function is merely to provide a method for carrying the property in the guise of commercial paper if the bank should become its owner. The deposit of the instruments in escrow does not affect the character of the transaction. It is but a device to insure performance. The important question is, what rights did the law give the parties under this arrangement, rather than, what did they conceive their rights to be?

(1) It is a familiar and undisputed proposition that no force will be given to a stipulation in a mortgage (or in a deed intended as a mortgage) by which the mortgagor agrees that, if he fails to make payment by a stated time, the mortgagee shall become the absolute owner of the property. 27 Cyc. 1098. It is equally well settled that no effect will be given to such an agreement made separately from the mortgage, but at the same time. 11 A. & E. Encyl. of L. 243.

(2) This principle renders ineffectual the deposit of a deed in escrow by the mortgagor at the time he gives the mortgage for delivery to the mortgagee if he fails to meet his obligation promptly; otherwise the rule could be readily evaded. *Plummer v. Ilse*, 41 Wash. 5, 82 Pac. 1009, 111 Am. St. Rep. 997, and note to same in 2 L. R. A. (N. S.) 628.

It is often said that after the execution of a mortgage the mortgagor may release to the mortgagee his 'equity of redemption'—using the term to denote his right to redeem after his default, or more properly, his actual title to the property, not referring to the statutory *right to redeem* after a sale on foreclosure. 11 A. & E. Encyl. of L. 243; note, 55 Am. St. Rep. 105; 3 Pomeroy's Equity Jurisprudence, Sec. 1193, note 1, p. 2371; 2 Jones on Mortgages, Sec. 1045. What is meant, however, as is shown by an examination of the cases cited in support of such statements, is merely that the mortgagor may at any time after the execution of the mortgage sell to the mortgagee outright all his interest in the property, by a conveyance operating at once, and in that sense release his right to redeem. But he cannot, even after the mortgage has been made, bind himself by an agreement that, if he does not pay his debt by a certain time in the future, he will forfeit all right to the property. The recognition of such a right in a few cases, of which *Bradbury v. Davenport*, 120 Cal. 152, 52 Pac. 301, is an example, seems to result from a failure to note the distinction referred to. Considerations of public policy forbid the enforcement of a contract, made by the borrower at the inception of his loan, that he will forfeit his interest in the property he offers as security if he fails to meet his obligation promptly. The same considerations apply with equal force where he makes a like contract upon a renewal of the loan or an extension of the time of its payment. To hold otherwise would be to deprive of the benefits of the rule those most in need of its protection. If at any time after the execution of a mortgage the mortgagee could, by an extension of time or upon any other new consideration, obtain from the mortgagor a valid agreement that if he did not pay the debt in full

by a certain date he should forfeit the entire security, then virtually the ancient common-law mortgage would be still in vogue, its rigors unrelieved by any equity of redemption. The modern tendency is to extend, rather than to contract, the scope of equitable relief against forfeitures.

“There is no principle in equity better settled than that every contract for the security of a debt, by the conveyance of real estate, is a mortgage; and all agreements of the parties tending to alter, in any subsequent event, the original nature of the mortgage, and prevent the equity of redemption, is void. If the conveyance, or assignment, was a mortgage in the beginning, the right of redemption is an inseparable incident, and cannot be restrained or clogged by agreement.” *Henry v. Davis*, 7 Johns. Ch. (N. Y.) 40, 42.

“The maxim, once a mortgage always a mortgage, does not cease to be applicable on the execution of the instrument, and will, on the contrary, invalidate a subsequent agreement tending to preclude the exercise of the right of redemption.” *Leading Cases in Equity*, White & Tudor. p. 1980, note.

“Once a mortgage always a mortgage, may be regarded as a maxim of the court. Equity is jealous of all contracts between mortgagor and mortgagee, by which the equity of redemption is to be shortened or cut off. The mortgagor may release the equity of redemption to the mortgagee for a good and valuable consideration, when done voluntarily, and there is no fraud and no undue influence brought to bear upon him by the creditor. But it cannot be done by a contemporaneous or subsequent executory contract by which the equity of redemption is to be forfeited if the mortgage debt is not paid on the day stated in such

contract, without an abandonment by the court of those equitable principles it has ever acted on in relieving against penalties and forfeitures." *Batty v. Snook*, 5 Mich. 231, 239, 240.

"Where land is conveyed to another by deed, absolute on its face, but to secure the payment of money, and the grantee gives the debtor a written agreement to convey the land on payment of the debt, the conveyance will be a mortgage only, and its character will not be changed by giving a new note and taking a new agreement to convey in which time is made the essence of the contract, and which provides that, in case of failure to pay on the day named, 'the intervention of equity' shall be forever barred—the relation of mortgagor and mortgagee will still exist." *Tennery v. Nicholson*, 87 Ill. 464, syllabus.

"A valuable article upon 'The Clog on the Equity of Redemption', in 21 *Harvard Law Review*, 459, 466, cites *Wynkoop v. Cowing*, 21 Ill. 570, as holding that an executory contract for the release of the equity of redemption may be held valid if made subsequently to the mortgage. The court there decided that the original transaction was a sale and not a mortgage, and what was said as to the release of the equity of redemption was avowedly dictum. The precise point here under discussion was not discussed.

"(3) If the deeds to the Trading Company are conceived as taking effect at the time of their deposit in escrow, or at the time of their first delivery to the Trading Company, then they amounted to mortgages under the usual test—the continued existence of the indebtedness. *McNamara v. Culver*, 22 Kan. 661; 1 *Jones on Mortgages* (6th Ed.) Secs. 264, 265; 27 *Cyc.* 1010. If the parties by the plan outlined in the first contract intended to carry

out an arrangement the legal effect of which would be to pass the title to the land, leaving Holden only a right for its re-purchase, they are shown by the second contract not to have consummated their purpose, but to have voluntarily abandoned that course and adopted one of a radically different nature, which made the deed, which had been signed and acknowledged, but not finally delivered, in effect a mortgage. The second contract distinctly recognizes the notes as subsisting obligations of Holden, and the loss of his title to the land is made to turn upon whether or not they are paid by a certain date. This feature is more noticeable because the first contract professed to show that the indebtedness had been extinguished. It is true that the notes were to be returned to Holden at the end of the period fixed, whether they were paid or not, and in the meantime they were in the hands of a third party, so that he was well protected against the enforcement of a personal liability upon them. But the fact remains that they were not to be returned to him until the expiration of the time named, and in the meanwhile he was not entitled to them. The existence or non-existence of an indebtedness is of importance in determining whether a transaction is a sale or a mortgage because it interprets and gives character to the language and conduct of the parties. The practical likelihood of the debtor being called on to respond to a personal liability is not an element in the determination of the matter. It is not material to inquire what purpose of the bank was subserved by the continued existence of the notes. It is enough that they were for some reason kept alive, and Holden remained a debtor to the bank. In November, 1904, Patton offered to deliver the notes to Holden, but he refused them. In February, 1906, the assistant cashier of the bank deliv-

ered them to him. The note of the Holden Company was never returned."

It will be noted in the agreement of June 8, 1899, that the papers were not strictly speaking delivered in escrow to the Bank of California—that is to say, no deed was executed by Spreckels to Graham. By paragraph six of the agreement of June 8, 1899, it is provided:

"That the first and second parties shall jointly execute and deliver to said trustee a deed to the following described property situate in the town of Marshfield."

And it is provided further in subdivision "C", paragraph 9, that if Graham shall pay the money within six months

"The second party hereby obligates itself to cause to be delivered to him * * * a good and sufficient deed of conveyance executed by said trustee to the first party of the above described real property."

Therefore, no contention can be made that title passed at the date of the agreement of June 8, 1899. On the contrary, the instrument explicitly provides that title shall pass only "at the expiration of said six months". As if specifically to avoid any question of title passing at the time, the makers of the contract distinctly declare that title shall not pass until the failure to make payment at a definite time in the future.

Likewise, the contract provides for the reduction of Graham's indebtedness, then under contest in

Court, to an agreed judgment, and this judgment was to be kept alive and was only to be extinguished by a satisfaction in case Graham paid. (Graham never received this satisfaction of judgment. See his testimony (Tr. p. 352) but it is immaterial whether he did receive it under the circumstances.)

Upon these subjects the above cited decision from the Supreme Court of Kansas is decisive:

“The second contract distinctly recognizes the notes as subsisting obligations of Holden and the loss of his title to the land is made to turn up whether or not they are paid *by a certain date*. * * * It is true that the notes were to be returned to Holden at the end of the period fixed, whether they were paid or not and in the meantime they were in the hands of a third party so that he was well protected against the enforcement of a personal liability upon them. But the fact remains that they were not to be returned to him until the expiration of the time named and in the meantime he was not entitled to them.”

And discussing the element of a continued indebtedness and dismissing the lack of practical danger against the enforcement of the indebtedness, the Court say:

“The existence or non-existence of an indebtedness is of importance in determining whether a transaction is a sale or a mortgage because it interprets and gives character to the language and conduct of the parties. The practical likelihood of the debtor being called on to respond to a personal liability is not an element in the determination of the matter.

It is not material to inquire what purpose of the bank was subserved by the continued existence of the notes. It is enough that they were for some reason kept alive, and Holden remained a debtor to the bank."

The opinion then recites the delivery by the escrow holder of the evidences of indebtedness back to Holden but holds this circumstance immaterial.

These facts are directly analagous to the case at bar. The indebtedness was kept alive and carefully preserved. The title was distinctly reserved in Graham until the expiration of a given period.

In *Marshall v. Russell*, 158 Pac. (Advance Sheets, July 17, 1916) the Supreme Court of Colorado reaffirms the doctrine advanced in *Livestock Co. v. The Trading Co.*, supra, and it is there said:

"The fact that the escrow agreement states that in the event of nonpayment, etc., the instrument shall become absolute, does not change the rule. It is a familiar and undisputed proposition that no force will be given to a stipulation in a mortgage or in a deed intended as a mortgage, or in any instrument executed at the same time, accompanying such deed, by which the mortgagor agrees that if he fails to make payment by a stated time, the mortgagee shall become the absolute owner of the property."

It is, of course, in this case, too plain for discussion that Spreckels was seeking to wipe out an equity of redemption by making a mere executory contract to be or not to be performed in the

future. This the law abhors and equity will not permit.

The decision in *Holden Land Company v. Interstate Trading Company*, supra, is the only case in America passing on facts identical with those in the case now before the Court. The principle upon which that decision is founded, however, has been variously illustrated. Thus in *Plummer v. Ilse* (Wash.), 82 Pac. 1009, reported with notes in 2 L. R. A. (N. S.), page 627, the parties endeavored by an ingenious arrangement to circumvent the rule forbidding the extinguishment of the equity of redemption. A deed absolute in form was placed in escrow to be delivered to the mortgagee on default in the payment of the mortgage debt in the future. As said by the editor of the *Lawyers' Reports Annotated*,

“The arrangement * * * was well adapted to the carrying out of the purpose to cut off the mortgagor's equity of redemption in the event mentioned if that result could be accomplished by any arrangement contemporaneous with the giving of the mortgage.”

The decision, therefore, which denies the deed, even after its delivery by the depositary to the mortgagee, the character of an absolute conveyance, and regards it as still the mortgage, must rest upon the restriction imposed by equity upon the freedom of contracting with respect to the equity of redemption.

In the decision the Court say:

“In deciding whether it was a mortgage, the principal test to be applied is whether the relation of the parties towards each other of debtor and creditor continued after the execution of the deed.”

If the above test is determinative of the question, then this case need proceed no further, because the parties expressly kept the indebtedness alive and the relation of debtor and creditor continued to exist.

And discussing the intention of the parties, the Court further says:

“On the other hand, if the transaction of the parties actually constitutes a mortgage in terms, it will have that effect though not so intended by them when it was done * * *.”

When The Spreckels Company provided, by the agreement of June 8, 1899, that the indebtedness of Graham on the promissory note of \$523,000 should be forthwith reduced to a judgment and a decree containing all of the usual clauses providing for sale of securities, execution of transfers and the like, it was taking all the means within its power to preserve the integrity of its indebtedness during the period in question.

The only way in which that indebtedness could have been extinguished was by the delivery of a receipt and acquittance *forthwith*. To reduce the indebtedness to a judgment was to reaffirm its claim to the repayment of the debt in the most

emphatic fashion known to the law. The mere fact that a satisfaction of the judgment thus secured was executed is wholly immaterial because the satisfaction was not effective but was held during the period of escrow and was to be contingent in its delivery upon the doing of certain things in the future. The satisfaction had no potency. That contingency might never occur. Until it should occur the satisfaction was as if it never had been written.

A creditor may deliver his promissory note to a bank together with a receipt in full for the amount of the indebtedness stated in the note, with instructions to the bank to deliver over the promissory note to the debtor at the end of six months if the debtor shall deposit the amount of money with the bank. *Can any one be found to say that the indebtedness evidenced by the promissory note is not existing during the period of time prior to the payment?*

The authorities are in harmony to the effect that the continued existence of the indebtedness in any form is held indelibly to stamp the transaction, whatever its nature, as a mortgage or pledge.

Holden Land & Livestock Co. v. Interstate Trading Co., 123 Pac. 737;

Hickox v. Lowe, 10 Cal. 206-7;

Montgomery v. Spect, 55 Cal. 352;

Plummer v. Ilse, 82 Pac. 1010 (Wash.);
41 Wash. 5;

McNamara v. Culver, 22 Kan. 661-8;
Bickel v. Wessinger, 113 Pac. 37; 58 Ore. 6;
27 Cyc., 1010.

We invite the special attention of the Court to the decision of *Montgomery v. Speet*, 55 Cal. 352. There an instrument strikingly similar to the one here involved was under discussion. A deed was delivered and simultaneously with it an agreement conditioned for the reconveyance of the property upon payment of the sum of \$7,000. This was for an antecedent debt secured by mortgage. Holding it to be still a mortgage, the court say:

“In such cases the central fact to be found is the existence of an indebtedness at the time of the transaction and a continuation of the relation of debtor and creditor. If that fact be found the inference deducible from it is that the debt was not made to transfer the title to land described in it, but was made for the purpose of securing the debt which the grantor owed to the grantee. * * * Speet gave no note or memorandum for the payment of the seven thousand and interest. Nor does the written agreement contain any promise by him to pay. But this circumstance does not make the conveyance less effectual as a mortgage if in fact there was a debt.”

Again in *Hickox v. Lowe*, 10 Cal. 206, the Court say:

“The consideration for the conveyance was a precedent debt upon the part of the grantor to Lowe, whose solution of the question under consideration depends upon the fact whether this debt was discharged by the conveyance or subsisted afterwards. If it continued after

the execution of the conveyance, the instruments constitute a mortgage. * * * This is the true test by which to determine the character of transactions like the present."

Furthermore, the mere change from a note to a judgment, or the merger of the note into a judgment, creates no change in the relation between debtor and creditor. It is as much a debt when reduced to judgment as it was in its original form.

Fisher v. Fisher, 98 Mass. 303;

Hills v. Flynn, 140 or 146 N. Y. Supp. 508;

King v. Hutchins, 28 N. H. 561.

Nor can any force be attached to the fact that during the six months' period the promissory note was delivered into the hands of a third party. It is not material that the note or the personal obligation is surrendered or even canceled if in fact the debt remains unpaid.

Marshall v. Thompson, 39 N. W. 309; 139 Minn. 137;

Holden v. Interstate Trading Co., 123 Pac. 733.

It may be contended that the agreement of June 8, 1899, contains no promise on the part of Graham to pay the \$550,000 within the six months period. This does not affect its character as a mortgage. It is not necessary that the contract for the payment of the money should contain any promise on the part of the debtor to pay.

Russell v. Southard, 19 Wall. 73;

Montgomery v. Spect, 55 Cal. 352;

Rempt v. Geyer, 32 Atl. 266.

Nor is it necessary that there shall be any personal liability.

Hickok v. Lowe, 10 Cal. 197;
Montgomery v. Spect, 55 Cal. 352;
Russell v. Southard, 19 Wall. 73;
Rempt v. Geyer, 32 Atl. 266;
Pioneer Gold Mining Co. v. Baker, 23 Fed. 258.

The rule with regard to shutting off the equity of redemption is not affected by the fact that the deed of conveyance or other transfer of properties or securities is made to a third person as trustee.

Marshall v. Thompson, 39 Minn. 137; 39 N. W. 309;
Robinson v. Willoughby, 65 N. C. 520;
McRobert v. Budget, 149 S. W. 906;
Holden Land Co. v. Interstate Trading Co., 123 Pac. 733; 87 Kan. 221.

As heretofore pointed out the parties joined in a deed to the Bank of California but no title whatsoever passed nor was any instrument executed purporting to pass title by Graham to Spreckels. The entire transfer so far as documents were concerned, was into the hands of a third party, and it was only long after the six months period that title was to pass to The Spreckels Company.

It is pointed out by the Supreme Court of the United States that where uncommon pains seem to have been taken to make the instrument a sale and not a mortgage, these very circumstances will be

considered in holding it to constitute in reality a pledge or mortgage, because equity will not suffer the debtor to be deprived of his equity of redemption.

Russell v. Southard, 19 Wall. 66.

Nor is it material to the legal situation that the debtor or creditor believe a conveyance was created by them. Acts done by the mortgagor in the belief that his right of redemption was gone will not prejudice him. If the instrument is a mortgage, it matters not what he believes or does while acting upon the assumption that it is something else than it really is.

Villa v. Rodriguez, 12 Wall. 339;

Russell v. Southard, 19 Wall. 67.

In all these cases a distinction is to be noted between an equity of redemption and a right of redemption.

An "equity of redemption", being the debtor's right to redeem after default, is to be distinguished from the mere statutory "right of redemption", after a sale by foreclosure. This distinction is clearly recognized by equity and explained in the following decisions:

Holden Land Co. v. Interstate Trading Co.,
123 Pac. 733;

Meyer v. Farmers Bank, 44 Iowa 212.

The right of redemption attaches to a pledge of personal property in the same way that it attaches to a mortgage of real property. Equity will not

permit the equity of redemption to be wiped out unless the pledge is disposed of by a foreclosure or by a sale according to statutory notice.

Luckett v. Townsend, 3 Tex. 119;

Ritchie v. McMullen, 79 Fed. 556;

Collins v. Denny Clay Co., 82 Pac. 1012,
(personal as well as real);

Vickers v. Battershall, 32 N. Y. Supp. 314;

Golden v. Fischer, 27 Cal. App. 272;

Williamson v. Culpepper, 16 Ala. 211;

Clark v. Davis, 2 Cowan (N. Y.) 324.

And wherever doubt exists as to whether an instrument constitutes a sale or a mortgage or pledge, that doubt must be resolved in holding the instrument to be an instrument of security and not of transfer.

Ferris v. Wilcox, 51 Mich. 105; 16 N. W. 252;

Bickel v. Wessinger (Ore.), 113 Pac. 25;

Pioneer Gold Mining Co. v. Baker, 23 Fed. 258.

It is contended by defendants in this action that the contract of June 8, 1899, constituted a conditional sale of the property. On the distinction between a conditional sale and a mortgage or pledge this whole action may be easily determined. Every element of the contract of June 8, 1899, is inconsistent with a sale, conditional or otherwise. A conditional sale *transfers title at the present moment*, with a conditional right to buy back. This is

directly contrary to the language of the present instrument.

Much weight is attached by the defendants to the opening paragraph of the contract reciting "that the parties hereto for the purpose of completely adjusting all matters of difference between themselves" entered into the contract. But the fact that they are attempting to completely adjust all matters between themselves only defines the attempt which they were then making to establish a basis upon which a settlement could be made. The mere recital of their desire to effectuate a complete settlement could not alter the fact that the agreement was made to depend upon contingencies which might or might not occur. A "complete settlement" may have been intended, but the machinery which they put in motion was not sufficient to effectuate that complete settlement. It would have been complete if it had been carried out by the payment of the money, but failure to pay the money could not deprive the debtor of his right to redeem his properties, some of which had never theretofore been under lien to the creditor (Tr. p. 348).

It is the law that where doubt exists whether an instrument shall be held to be a conditional sale or a mortgage or pledge, it must be held to be the latter.

Hickok v. Lowe, 10 Cal. 207;

Russell v. Southard, 19 Wall. 66;

Pioneer Gold Mng. Co. v. Baker, 23 Fed. 258;

Luckett v. Townsend, 3 Tex. 129.

The fact that time is to be of the essence of the contract is immaterial, for an equity of redemption cannot be shut off by any such provision.

Tennery v. Nicholson, 87 Ill. 465;

Robinson v. Willoughby, 65 N. C. 520;

Pioneer Gold Mng. Co. v. Baker, 23 Fed. 258;

McRobert v. Budget, 149 N. W. 906;

Roy v. Patterson, 87 S. E. 212;

Holden Land Co. v. Interstate Trading Co., 123 Pac. 733; 87 Kan. 221.

The learned judge of the District Court in his opinion stated that there seemed to be a conflict between authorities as to whether an equity of redemption could be wiped out by a subsequent executory agreement, fairly entered into. He held that this right to wipe out the equity of redemption had been denied by certain Courts and cited *Holden v. Interstate T. Co.*, 123 Pac. 733, but said:

“The courts of California, where the contract in suit was made and to be performed, recognized such right”,

and cited the decision of *Bradbury v. Davenport*, 120 Cal. 152.

On two distinct questions, I take issue with the learned judge of the District Court, for whose opinion I hold the profoundest regard, namely:

First. The decision in *Bradbury v. Davenport* is not controlling on the merits against our position; and

Second. The fact that the contract was made in California does not make a decision of California controlling as to the construction of the contract.

This case twice reached the Supreme Court of the State of California. A demurrer having been sustained to its complaint, it is reported in *Bradbury v. Davenport*, 114 Cal. 596; that adjudication has become a legal authority throughout the United States on the proposition:

“That the mortgagor is not allowed to renounce, before hand, his privilege of redemption; that while generally any one may renounce any privilege or surrender any right himself, an exception is made in favor of debtors who have mortgaged their property, for the reason that their necessities often drive them to make ruinous concessions; that when one borrows money upon the security of his property he is not allowed by any form of words to preclude him from redeeming it.”

The Supreme Court having reversed the judgment on the pleadings, the matter again came to the Supreme Court on an appeal from a judgment on the facts, and is reported in *Bradbury v. Davenport*, 120 Cal. 152.

The question turned upon the construction to be applied to Sec. 2889 of the Civil Code of California. No question of oppression or of advantage of a creditor over a debtor was involved and the points which are urged in this action do not seem to have been pressed upon the attention of the Court. It was found by the Court that the transaction was in every way fair, honest and without fraud or un-

conscionable advantage, but it must be conceded that the Court, without discussing the question here involved, permitted the deed to stand on the ground that it was a fair transaction entered into between the creditor and the plaintiff's intestate, in full satisfaction of an indebtedness. But there the deed was delivered to the agent, and under the law of escrow, took effect by relation to its date. Here no deed was made or delivered, but the land was conveyed to the bank for future disposition by it. This is not an escrow. If the decision can be construed to recognize the right to wipe out an equity of redemption by an executory contract—and it is nowhere so held in the opinion—it is directly in the face of all authority throughout the United States. The principle is sufficiently and clearly determined in authorities of which *Plummer v. Ilse*, 82 Pac. 1010, and *Holden L. Co. v. Interstate Trading Co.*, 123 Pac. 737, are the highest expression.

It is not the law that a contract must be determined by the law of the state in which the contract was made. Law and jurisdiction are not confined to geographical limits. Whatever equity demands will be granted regardless of the place the contract was made, and the fact that the agreement was entered into between parties in California does not make a decision of the California Supreme Court controlling on the question.

Rapple v. Dutton, 226 Fed. 430.

THE CONTRACT OF JUNE 8, 1899, WAS EXECUTED AS THE CULMINATION OF OPPRESSIVE ACTS EXERCISED BY THE SPRECKELS COMPANY OVER THE PLAINTIFF, GRAHAM, AND UNDER CIRCUMSTANCES WHICH REQUIRE A COURT OF EQUITY, IN JUSTICE, TO DECLARE IT TO BE A MORTGAGE, PLEDGE OR SECURITY.

Aside from the face of the instrument, the circumstances under which its execution was brought about show that degree of oppression, duress and compulsion which equity abhors and under and by virtue of which equity invariably holds the instrument to be a mortgage. The very care with which the instrument seems to have been drawn in an attempt to defeat the equity of redemption, of itself offends equity and requires the destruction of the instrument as an attempt to destroy the equity of redemption.

Every element, in aggravated form, discussed in the numerous cases holding such agreements to be mortgages and not conditional sales is involved in the circumstances leading up to and surrounding the making of the contract in question.

Villa v. Rodriguez, 12 Wall. 339;

Jones on Collateral Securities, Sec 553;

Russell v. Southard, 19 Wall. 67;

Montgomery v. Spect, 55 Cal. 352;

Collins v. Denny Clay Co., 82 Pac. 1012;
41 Wash. 673;

Marshall v. Thompson, 39 N. W. 309; 139
Minn. 137 (142);

Bickel v. Wessinger, 113 Pac. 37-8;

Ritchie v. McMullen, 79 Fed. 556;
Lewis v. Wells, 85 Fed. 898 (Oregon Law);
Simpson v. First Nat'l Bank, 93 Fed. 310;
Grover v. Hawthorne, 62 Or. 77;
Pioneer Mining Co. v. Baker, 23 Fed. 258;
Feris v. Wilcox, 61 Mich. 105; 16 N. E. 252;
Rempt v. Geyer, 32 Atl. 266;
Mooney v. Byrne, 57 N. E. 163; 41 Wash 5;
Plummer v. Ilse, 82 Pac. 1009;
Jackson v. Lynch, 129 Ill. 72;
Robinson v. Willoughby, 65 N. C. 520;
Frodevoux v. Jordan, 64 W. Va. 388;
 62 S. E. 686;
Roy v. Patterson, 87 S. E. 212 (N. C.);
Wilson v. Fisher, 148 N. C. 535; 62 S. E. 662;
Dickens et al. v. Simpson, 174 S. W. 1154
 (Ark.).

In *Villa v. Rodriguez*, 12 Wall. p. 339, the Supreme Court of the United States say:

"The law upon the subject of the right to redeem where the mortgagor has conveyed to the mortgagee the equity of redemption, is well settled. It is characterized by a jealous and salutary policy. Principles almost as stern are applied as those which govern where a sale by a *cestui que trust* to his trustee is drawn in question. To give validity to such a sale by a mortgagor it must be shown that the conduct of the mortgagee was, in all things, fair and frank, and that he paid for the property what it was worth. He must hold out no delusive hopes; he must exercise no undue influence; he must take no advantage of the fears or poverty of the other party. Any indirection or obliquity of conduct is fatal to his title. Every

doubt will be resolved against him. Where confidential relations and the means of oppression exist, the scrutiny is severer than in cases of a different character. The form of the instruments employed is immaterial. That the mortgagor knowingly surrendered and never intended to reclaim is of no consequence. If there is vice in the transaction the law, while it will secure to the mortgagee his debt, with interest, will compel him to give back that which he has taken with unclean hands. Public policy, sound morals, and the protection due to those whose property is thus involved, require that such should be the law."

While under the first subdivision of this argument we are fortunate in having the support of the Supreme Court of Kansas on a case practically identical as to the contract, the plaintiff is equally fortunate in having a decision on the facts in *Collins v. Denny Clay Co.*, (Wash.) 82 Pac. 1012, in which Judge Rudkin wrote the opinion.

John Collins was indebted to the Denny Clay Co., and the indebtedness was secured by a pledge of assets of the value of \$34,000. At the same time, he was also indebted to A. A. Denny. The Denny Clay Company commenced action against Collins for the recovery of the amount due and *for the foreclosure of the shares of stock given as a pledge to secure the same*. The Denny Clay Co. being about to take judgment, entered into an agreement reciting the commencement of the action against the debtor, Collins, for the purpose of foreclosing the pledge; that the first party, plaintiff, was about to take judgment, and provided that in considera-

tion of the dismissal of said action and a satisfaction of the claim sued on, the party of the second part, Collins,

“Does hereby sell, assign, and set over unto the party of the first part, said stock as the absolute property of the party of the first part and as *a complete settlement of the indebtedness due by the party of the second part to the party of the first part upon said settled account sued upon.*”

The party of the first part was to dismiss the action and this provision follows:

“It is further agreed that the party of the second part shall have the privilege of purchasing said stock from the party of the first part provided the party of the second part shall pay to the party of the first part on or before the fifteenth day of March next the sum of * * *

In case the party of the second part shall fail to make either of said payments * * * that this right to purchase on the part of the second party shall be at an end.”

The action was brought by the executors of Collins' estate to declare the above agreement to be a mortgage or pledge and to enforce the right to redemption and for an accounting. It will be noticed that the action is precisely similar to the one involved in the pending case.

We quote from the opinion of the Supreme Court of Washington rendered through Judge Rudkin, as follows:

“The only remaining conclusion is the correctness of the finding or conclusion that the transaction in question was a mortgage or

pledge. This is a mixed question of law and fact, and both parties agree that whether a conveyance be a mortgage or a conditional sale must be determined by a consideration of the peculiar circumstances of each case. All the authorities agree that a mortgagor cannot, through any device, bargain away his right of redemption at the time of giving the mortgage. *Bradbury v. Davenport*, 114 Cal. 593; 46 Pac. 1062; 55 Am. St. Rep. 92; *Plummer v. Ilse* (just decided by this court) 82 Pac. 1009. While a mortgagor may release his equity of redemption to the mortgagee by a subsequent agreement, yet the courts view such agreements with distrust and disfavor, and, if it appear that the mortgagee has taken advantage of the necessities of the mortgagor, or that the consideration is grossly inadequate, the release will be disregarded and the original relation held to continue. Applying these rules in the case at bar, it appears that the relation of debtor and creditor existed between Collins and Denny and the Denny Clay Company at the time the agreement in question was entered into, and had so existed for some years before. Collins was insolvent, owing in all about \$200,000. The total indebtedness included in the two notes was less than \$8,000, and the total indebtedness actually released less than \$3,500. The value of the property surrendered, as found by the court, exceeded \$27,000, and the short period of four months was allowed an insolvent debtor to pay the indebtedness and reclaim the stock. We doubt if any authority can be found to sustain such a transaction."

The Court calls attention to the fact that the agreement (in language almost identical with that here involved) had stated the agreement to be "a complete settlement," and quoting from the Su-

preme Court of the United States in a somewhat similar case says:

“In respect to the written memorandum it was clearly intended to manifest a conditional sale. Very uncommon pains are taken to do this. Indeed, so much anxiety is manifested on this point as to make it apparent that the draftsman considered he had a somewhat difficult task to perform. But it is not to be forgotten that the same language which truly describes a real sale may also be employed to cut off the right of redemption; that it is the duty of the court to watch vigilantly against these exercises of skill, lest they should be effectual to accomplish what equity forbids; and that in doubtful cases the court leans to the conclusions that the reality was a mortgage and not a sale.”

The Supreme Court of the United States in *Russell v. Southard*, 12 How. 139, says:

“It is true Russell must have given his assent to this form of the memorandum; but the distress for money under which he then was, places him in the same condition as other borrowers, in the numerous cases reported in the books, who have submitted to the dictation of the lender under the pressure of their wants; and a court of equity does not consider a consent thus obtained to be sufficient to fix the rights of the parties. Necessitous men, says the Lord Chancellor in *Vernon v. Bethell*, are not truly speaking, free men, but to answer a present emergency will submit to any terms that the creditor may impose upon them.”

In *Bickel v. Wessinger*, (Ore.) 113 Pac. 37, it is said of a similar arrangement between debtor and creditor:

“Equity regards the rights of a distressed debtor with almost guardian-like care and while it requires clear proof of a parol defeasance of a deed absolute in form, yet, when the defeasance clause is once shown, equity will go to the utmost in affording relief, and in cases of doubt between a mortgage and a conditional sale will *almost always* decide the question in favor of a mortgage.”

And discussing the agreement, the court proceeds:

“Was it an agreement to sell back the property or was it a mortgage? The test held by most authorities to be the controlling one in such cases in this: Was the preceding debt extinguished or was it continued? If it was extinguished the arrangement would only be at best a contract for the resale of the property, but, if the debt was continued, it is taken to be a mortgage.”

In that case, the note was not completely surrendered, notwithstanding the sheriff's sale, and that circumstance alone was held to indelibly stamp the transaction as a mortgage. The Court proceeds:

“The doctrine that, in cases of doubt between a contract for the resale of property and a mortgage, the latter will be upheld, is founded upon the wholesome and equitable reason that, if the transaction is determined to be an agreement for resale, it is so nominated in the bond that, unless by an appointed time the former debtor pays, he loses all and the creditor gains all; but, on the contrary, if it is held to be a mortgage, equity will seize upon the property, convert it into money, returning to the creditor his own with interest and to the debtor the re-

mainder, so that each is saved harmless as near as may be.

We conclude that the transaction referred to is a mortgage."

In *Plummer v. Ilse*, (Wash.) 82 Pac. 1010, the agent for both parties, receiving the deed, signed a written instrument, reading in part as follows:

"I hereby agree to hold the deed until the note and mortgage shall become due and past due, and *then* the deed shall be delivered to the mortgagee."

It was held that the parties could not by any stipulation wipe out the equity of redemption.

In *Ritchie v. McMullin*, 79 Fed. 556, the court considers an arrangement somewhat similar to the one here involved, wherein the debtor promised to take up the indebtedness within a certain period of time or forfeit title. The court say:

"It is very clear to us that whatever the words of these contracts a court of equity would refuse, under the circumstances, to give either of them effect, as a sale of the stocks and bonds * * * A court of equity scrutinizes with great care the contracts made between pledgee and pledgor as to the transfer of title to the pledgee and does not hesitate to set aside such a contract if there is any ground for thinking that it is a harsh contract and one brought about by the position of vantage which the pledgee occupies with reference to the pledgor."

Citations may be multiplied without number. They can be found applicable to almost any state of facts and persuasive to the effect that all con-

tracts between debtor and creditor must be strictly scrutinized and considered with a view to save the debtor from the clutch of the creditor.

In the list of authorities set forth above, will be found many from which no quotation is here made, but any one of which might seem decisive of the facts in this case. Thus, in *Montgomery v. Spect*, 55 Cal. 353, an agreement entered into for a reconveyance of the mortgaged property, under circumstances closely akin to those involved here, was determined under careful review of the authorities to be of such nature that a court of equity must, in order to enforce the doctrines upon which that jurisprudence was founded, declare it to be a mortgage.

These features seem to stamp the transaction unquestionably as a mortgage.

Graham was indebted to The Spreckels Company in about the sum of \$550,000. They had sued him for the foreclosure of certain securities and procured, by arrangement in this agreement, a decree by which they were permitted to sell under the statutory procedure of the state and recover a deficiency; the debt was kept alive because it was not wiped out by any instrument then effective or to be delivered until the end of the six months period; the provision for a repurchase of the property in case the six months obligation was paid cannot be held to be anything other than an extension of the mortgage.

This being a mortgage, therefore, and never having been foreclosed, The Spreckels Company is remitted to its remedy by foreclosure. Entitled to receive in the agreement only \$550,000, The Spreckels Company, by fraud secured \$1,300,000. The only possible deduction they could claim from this would be the value of the two small steamers, the *Czarina* and the *Breakwater* (Tr. p. 557). Having thus received over two and a half times the amount of the money due them, equity will not fail to insist upon an accounting, or, in this case, by virtue of the fact that the property was actually sold to the Southern Pacific Company with notice, to a judgment for the amount due.

The following are considered material inquiries in deciding whether the instrument is in fact a mortgage:

First. The financial condition of the debtor.

Fisher v. Wilson, 62 S. E. 662.

On this question the evidence, of course, is overwhelming that Graham was not merely on the brink of financial ruin, but had been driven to that point by the actions of The Spreckels Company.

Second. The value of the property as compared with the debt.

Ferris v. Wilcox, 16 N. W. 252;

Simpson v. First National Bank, 93 Fed. 309;

Roy v. Patterson, 87 S. E. 212.

On this question it is admitted that Spreckels sold the property for \$1,300,000, and included in this there was no other property except the Czarina and the Breakwater, two boats which had cost Spreckels the sum of \$125,000 (Tr. p. 557). Spreckels, himself, testified that he had only received a million dollars, but on cross-examination was confronted with his own sworn statement in another inquiry fixing the sum at \$1,300,000 (Tr. p. 559). Graham's indebtedness amounted at the outside to \$550,000, and this was a development of the original promissory note of \$523,162, of which only \$306.151 was actually advanced, the balance, amounting to \$217,011 being made up of bonuses, commissions and interest. Therefore, out of \$1,300,000 (or deducting the value of the boats which form the only foreign element, \$1,150,000) the only moneys ever advanced by Spreckels amounted to \$306,151.06 (see testimony, Treasurer Gibson, Tr. p. 630).

Therefore, we have this astonishing fact, namely: That these properties of Mr. Graham's, earned by his industry, were actually sold by the Southern Pacific Company for over one million dollars more than the Spreckels Company had actually put into their venture.

Third. The nearness to the amount of the debt or the disparity in amounts.

Collins v. Denny Clay Co., 82 Pac. 1012;

Rempt v. Geyer, 32 Atl. 262;

Fisher v. Wilson, 16 N. W. 252;

McNamara v. Culver, 22 Canadian 461.

Fourth. Knowledge of the creditor as to the source from which the debtor was to secure the money to pay.

Rempt v. Geyer, 32 Atl. 266.

On this question, the evidence is absolutely without dispute, as set forth in the foregoing summary of facts, that Spreckels & Company knew that Graham was to receive the money from the Southern Pacific Company, and that Spreckels also deliberately and designedly persuaded the Southern Pacific Company not to advance the money but to allow Graham to fail in making the payment and that thereafter The Spreckels Company and the Southern Pacific Company would make an arrangement between themselves satisfactory to both (Tr. pp. 341-3).

In all the learning in the books, there is no case cited more extreme in the harshness with which the debtor was driven to the wall by a designing creditor than this:

That a debtor who himself was the creator of the wealth can be thus deprived of his property without accounting and without an opportunity to redeem is violative of the plainest equitable rules.

It is respectfully submitted that appellant is entitled to a reversal and to an order which will enable him to secure the restoration of his property on the payment of what is justly due or shall have a

judgment for the difference between the amount due to The Spreckels Company and the amount they actually received.

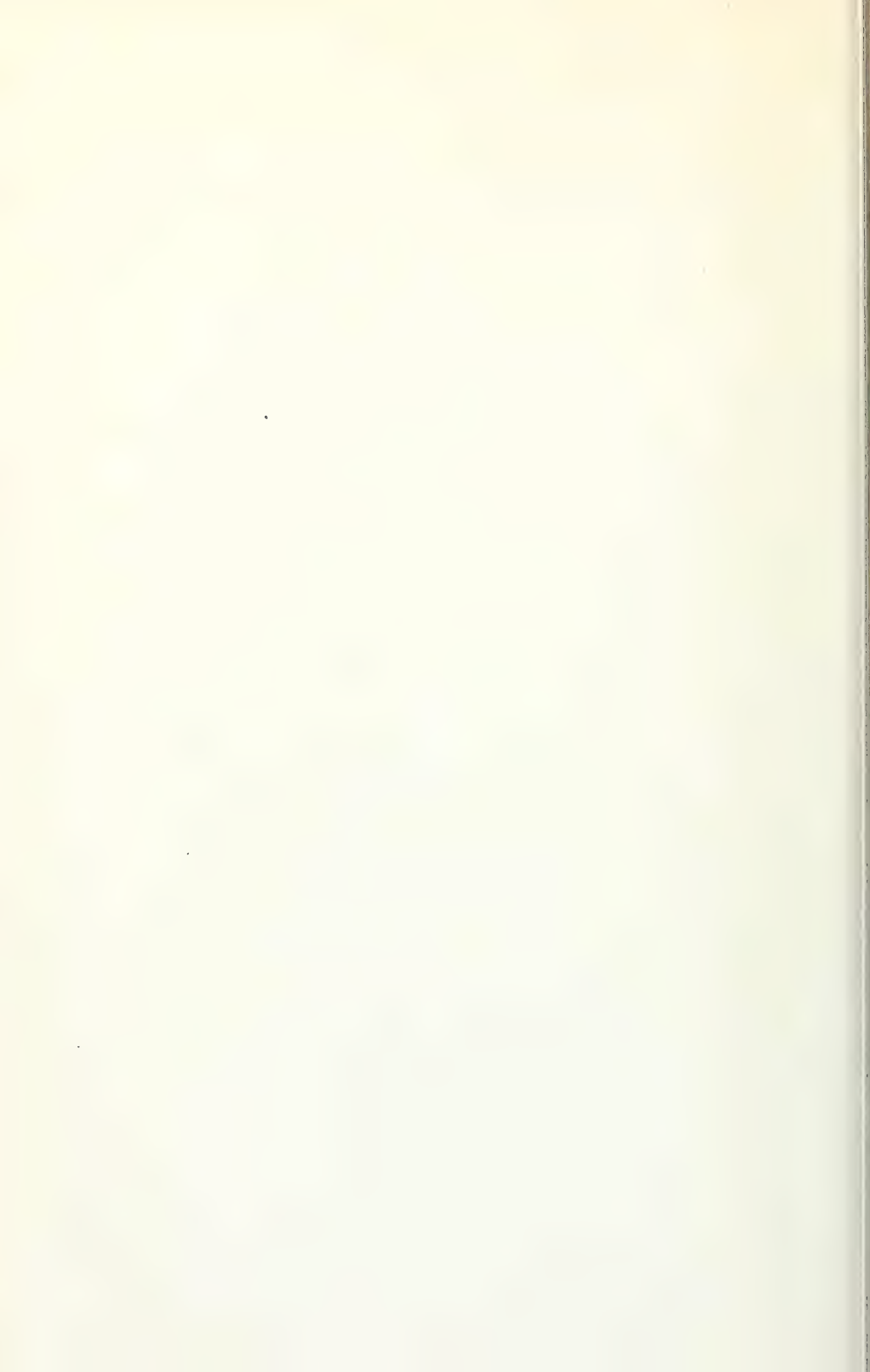
Dated, San Francisco,
January 29, 1917.

Respectfully submitted,

JOHN L. McNAB,

Attorney for Appellant.

(APPENDIX FOLLOWS.)



APPENDIX.

EXHIBIT "A."

This agreement, made this 8th day of June, 1899, by and between R. A. Graham, party of the first part, and J. D. Spreckels & Brothers Company, a corporation, party of the second part, Witnesseth:

That the parties hereto, for the purpose of completely adjusting all matters of difference between themselves, and between each of them and the Beaver Hill Coal Company, a corporation, and the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, a corporation, do hereby agree as follows:

1. That the receivership suit brought by the first party against said Beaver Hill Coal Company, and now pending in the Circuit Court of the United States for the District of Oregon, shall at once be dismissed upon the settlement of the account of W. W. Catlin, receiver of said Company, each party to said suit to bear his own costs; that an order be at once made in said suit directing said receiver to render an account to said Court, and that upon the settlement of said account an order be made removing said receiver; that all proper fees, costs and charges of said receiver and of J. B. Hassett, the former receiver, and all proper certificates issued by said Hassett and said Catlin as said receivers be paid as far as possible out of the funds in the hands of said Catlin, as said receiver when the

same are allowed by the said Court; that said receiver shall surrender the possession and custody of all the property of said Beaver Hill Coal Company unto said company; that said company shall remain in the possession of all its said property during the life of this agreement, without interference in any manner by the first party; that the second party will cause proper steps to be taken by the Beaver Hill Coal Company, so long as it controls the same, for the care and preservation of said property during the life of this agreement; and that the moneys received by said company after the removal of said receiver shall be applied towards the payment of the balance, if any, remaining due for said fees, costs and charges of said Hassett and Catlin, as said receivers, and on said certificates of said receivers, and also towards the payment of all proper expense incurred in the care and preservation of the property of said company after the removal of said Catlin, as said receiver, and during the life of this agreement.

2. That the suit brought by said Beaver Hill Coal Company against the first party for an accounting, now pending in the Superior Court of the City and County of San Francisco, State of California, shall be at once dismissed, each party thereto to bear his own costs; and that there shall be delivered to the first party, upon the signing of this agreement, a release executed by said Beaver Hill Coal Company, releasing and discharging the first party of and from any and all claims and de-

mands which it may now have or claim to have against him.

3. That the receivership suit brought by the second party against the Coos Bay, Roseburg & Eastern Railroad & Navigation Company now pending in said Court of the United States, for the District of Oregon, shall be at once dismissed, each party thereto to bear his own costs.

4. That a judgment shall be at once entered in the suit brought by the second party against the first party, now pending in said Superior Court of the City and County of San Francisco, State of California (Department No. 3 thereof), numbered 64,541, in favor of the second party and against the first party for the sum of \$523,162.52 together with interest thereon at the rate of six per cent per annum from the 1st day of April, 1898, both in United States gold coin and providing for a sale of the pledged securities sought to be foreclosed in said suit, and with the usual provisions for the docketing of a judgment against the first party for any deficiency which may exist after the sale of the collaterals specified in the original complaint in said suit; that all proceedings to enforce said judgment be stayed for the period of six months after the date of this agreement.

5. That the parties hereto hereby designate and appoint the Bank of California, a corporation, as trustee for them, to hold the properties and written instruments hereinafter mentioned for the purposes

hereinafter set forth, and to perform the duties hereinafter prescribed.

6. That the first party shall deliver to said trustee:

a. All of the shares of the capital stock of said Coos Bay, Roseburg & Eastern Railroad & Navigation company in excess of the 10,001 shares thereof now held by the second party, certificates therefor to be properly endorsed, excepting seven shares thereof to be issued to the Directors of said Company as hereinafter provided.

b. The resignation of all of the directors of said Company now in office, the same to take effect upon the election of the directors hereinafter named.

c. A release executed by the first party releasing and discharging the said Beaver Hill Coal Company of and from any and all claims and demands which he may now have or claim to have against said Company, said release not to take effect, however, except upon the failure of the first party to pay or cause to be paid to said trustee, for the use and benefit of the second party, the sum of \$550,000.00 gold coin of the United States, as hereinafter provided.

d. A release executed by the first party releasing and discharging the said Coos Bay, Roseburg & Eastern Railroad & Navigation Company of and from any and all claims and demands which he may now have or claim to have against said Company; also a disclaimer of all right, title or interest in or to any of the property of said Com-

pany, including the equipments and rolling stock of the railroad, and the spur tracks to the mine of the Beaver Hill Coal Company, and to the mine of the Beaver Coal Company, the same being known as the "Klondike Mine," said release and disclaimer not to take effect, however, except upon the failure of the first party to pay or cause to be paid to said trustee, for the use and benefit of the second party, said sum of \$550,000.00 gold coin of the United States, as hereinafter provided.

That the second party shall deliver to said trustee:

a. The certificate for the 10,001 shares of the capital stock of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company heretofore pledged to the second party by the first party, said certificate to be properly endorsed by the second party.

b. All of the bonds of the said Coos Bay, Roseburg & Eastern Railroad & Navigation Company heretofore pledged by the first party to the second party, and now in its hands, of the par value of \$620,000.00.

c. Assignments, in proper form, to said trustee, of all judgments of record which have been rendered in the courts of Coos County, in the State of Oregon, in favor of the second party, and are now held by it as collateral security for the payment of moneys owing to it by the first party.

d. All of the shares of the capital stock of said Beaver Hill Coal Company, excepting one share

thereof to be issued to each one of the present directors of said Company, but said shares of stock issued to said directors shall be duly endorsed and delivered by them to said trustee as soon as possible hereafter, the same to be then held by said trustee together with the other shares of said stock for the uses and purposes hereinafter set forth.

e. A satisfaction, in proper form, and duly acknowledged of said judgment entered in said suit mentioned in paragraph number four of this agreement.

That the first and second parties shall jointly execute and deliver to said trustee a deed to the following described property situate in the Town of Marshfield, in Coos County, Oregon, sufficient in form and substance to vest the title thereto in said trustee, to wit:

All of blocks numbered one (1), two (2), six (6), eight (8), sixteen (16), twenty-one (21), twenty-eight (28), thirty-three (33), thirty-four (34), thirty-five (35), thirty-six (36), thirty-seven (37), forty-six (46), forty-seven (47), forty-eight (48), forty-nine (49), fifty-two (52), fifty-three (53), fifty-four (54), fifty-seven (57), fifty-nine (59), sixty-three (63), sixty-six (66), sixty-seven (67), seventy (70), seventy-one (71), seventy-five (75), seventy-seven (77), eighty (80), eighty-one (81), eighty-four (84), eighty-five (85), also block lettered "C," also lots one (1) and two (2) and lots eight (8) to forty (40) inclusive, in block numbered fifty-six

(56), in "Railroad Addition to Marshfield," according to the plat of said Addition made by G. H. Spencer, and duly recorded in the office of the County Recorder of said Coos County, Oregon.

7. That there shall be transferred and issued to each of the following-named persons, to wit: William L. Pierce, Frederick S. Samuels, W. S. Chandler, S. H. Hazard, R. A. Graham, J. W. Bennett and T. R. Sheridan, one share of the capital stock of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, which said shares of stock shall be duly endorsed and delivered by them to said trustee as soon as possible hereafter, the same to be then held by said trustee together with the other shares of said stock for the uses and purposes hereinafter set forth. That a meeting of the directors of said Company shall be called for the reorganization of the Board of Directors of said Company, and at said meeting the persons above named shall be elected to serve as directors of said Company during the life of this agreement, and until their successors are elected and qualified. Upon their election, as such directors, there shall be signed by each of said parties a written resignation of his said office as director, the same to be then delivered to said trustee; such resignation not to take effect, however, except as hereinafter provided.

8. The first party shall remain as manager of said Coos Bay, Roseburg & Eastern Railroad &

Navigation Company during the life of this agreement, and subject to the terms hereof. At all times during the life of this agreement the second party shall be entitled to have a representative in the County of Coos, State of Oregon, who shall be permitted at all times, upon demand, to inspect all books, papers and vouchers of every kind connected with the business of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company. Said Company shall be operated during the life of this agreement as a railroad corporation and common carrier of passengers and freight for hire, and shall not be used to further the personal purposes or enterprises of any individual in any manner which will not be to the best interests of said Company, and shall offer no special advantages in freights or fares, rebates or credits to any individual not granted to the community by general tariff and regulation. It is agreed that the rate of forty cents per ton heretofore fixed for the transportation of the coal of the Beaver Coal Company over said railroad shall not be changed during the life of this agreement.

9. That if, at any time within six months from the date of this agreement, the first party shall pay or cause to be paid to the said trustee, for the use and benefit of the second party, the sum of \$550,000.00 in gold coin of the United States, the title to all of the shares of stock, bonds, real property and

judgments below mentioned shall thereupon vest in, and the same shall become the absolute property of the first party; and said trustee is hereby authorized and directed to thereupon deliver to the first party, and the second party hereby obligates itself to cause to be thereupon delivered to him:

a. All of the capital stock of said Beaver Hill Coal Company placed in the hands of said trustee, and all of the shares thereof issued to said directors of said Company, all duly endorsed.

b. All of the capital stock of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, placed in the hands of said trustee, and all of the bonds of said Company placed in the hands of said trustee.

c. A good and sufficient deed of conveyance executed by said trustee to the first party, of the above described real property in said town of Marshfield.

d. Assignments, in proper form, executed by said trustee to the first party, of all said judgments in favor of the second party assigned by it to said trustee, as hereinabove provided, or, if said judgments, or any of them, have been collected by said trustee, then to pay over the moneys collected thereon to the first party.

e. Said satisfaction of said judgment entered in said suit mentioned in paragraph number four of this agreement.

f. The resignations of the following directors of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, to wit:

WILLIAM L. PIERCE,
FREDERICK S. SAMUELS,
W. S. CHANDLER, and
S. H. HAZARD,

said resignations to then take effect.

g. Said release executed by the first party in favor of said Beaver Hill Coal Company, and said release and disclaimer of the first party in favor of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company.

And said trustee shall at the same time deliver to the second party said sum of \$550,000.00 in gold coin of the United States.

Said payment of said sum of \$550,000.00 in gold coin of the United States to said trustee, for the use and benefit of the second party, shall operate as a full settlement, satisfaction and discharge of all claims and demands of every kind and nature whatsoever now existing in favor of either party hereto against the other; and of all claims and demands of every kind and nature whatsoever now existing in favor of the second party against said Beaver Hill Coal Company and said Coos Bay, Roseburg & Eastern Railroad & Navigation Company.

The second party further agrees that it will, upon demand of the first party at any time after the payment of said sum of \$550,000.00 to said

trustee, execute a proper consent in writing to the cancellation of that certain order heretofore given by said Coos Bay, Roseburg & Eastern Railroad & Navigation Company to the Farmers Loan & Trust Company, directing the delivery by said Farmers Loan & Trust Company to the second party of the bonds of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, as they may be issued from time to time.

10. Should the first party fail to pay or cause to be paid to the said trustee for the use and benefit of the second party, within said six months from the date hereof, said sum of \$550,000.00, in gold coin of the United States, *the title to all of the shares of stock, bonds, real property and judgment above mentioned shall, at the expiration of said six months*, vest in and the same shall become the absolute property of the second party; and said trustee is hereby authorized and directed to thereupon deliver to the second party:

a. All of the capital stock of said Beaver Hill Company placed in the hands of said trustee, duly endorsed.

b. All of the capital stock of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company placed in the hands of said trustee, and all of the bonds of said Company placed in the hands of said trustee.

c. A good and sufficient deed of conveyance executed by said trustee to the second party of the above described real property in said town of Marshfield.

d. Assignments, in proper form, executed by said trustee, to the second party of all said judgments in favor of the second party assigned by it to said trustee, as hereinabove provided, or, if said judgments, or any of them, have been collected by said trustee, then to pay over the moneys collected thereon to the second party.

e. The resignation of the following directors of the said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, to-wit:

R. A. Graham, T. E. Sheridan and J. W. Bennett, said resignation to then take effect.

f. Said release executed by the said party in favor of said Beaver Hill Coal Company, and said release and disclaimer of the first party in favor of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company.

And said trustee shall at the same time deliver to the first party said satisfaction of said judgment entered in said suit mentioned in paragraph number four of this agreement; and second party shall cause said Coos Bay, Roseburg & Eastern Railroad & Navigation Company to execute and deliver to the first party a release and discharge of any and all claims and demands which it may have or claim to have against the first party. And all matters and things in dispute between the parties hereto, or between the first party and said Beaver Hill Coal Company and said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and all claims and demands shall be and become, by virtue hereof, finally and forever settled and determined.

11. Upon the performance by said trustee of the acts hereinabove provided to be done by it, said trust shall cease and determine.

12. The second party further agrees to cause to be executed and delivered by said Beaver Hill Coal Company to said T. R. Sheridan, of Roseburg, Oregon, upon the execution of this agreement, a quit-claim deed to the northeast quarter of section nineteen, township twenty-seven south of range thirteen west of the Willamette Meridian; also to cause to be executed and delivered by A. B. Spreckels (the Vice-President of the second party), to the trustee hereunder, upon the execution hereof, an agreement whereby the first party shall be given the option and right to purchase from said A. B. Spreckels all his right, title and interest in and to that certain real property in said Coos County, Oregon, Known as and called the "Chadwick Tract", upon the payment by the first party to said A. B. Spreckels of the sum of money paid by said A. B. Spreckels for said right, title and interest in and to said property, together with interest thereon at the rate of six per cent per annum, said agreement for said option not to take effect, however, except in the event that the first party shall pay said sum of \$550,000.00 to said trustee for the use and benefit of the second party within said six months from the date hereof, as hereinabove provided.

13. The second party further agrees that it will re-deliver to the first party that certain policy of

life insurance issued to the first party by the New York Life Insurance Company, numbered 664,673, and now held by the second party together with a waiver by it of all claim to or interest in said policy, upon the payment to it by the first party of the sum of \$2950.00, at any time during the life of this agreement.

14. It is mutually agreed that time shall be the essence of this agreement and that this agreement shall inure to the benefit of and shall bind the heirs, executors, administrators, successors or assigns of the respective parties hereto.

In witness whereof, the first party has hereunto set his hand and the second party has caused its corporate name and seal to be hereunto affixed by its President and Secretary, the day and year first above written.

Done in duplicate.

Witnesses to signature of:	R. A. GRAHAM.
R. A. GRAHAM.	J. D. SPRECKELS
ISAAC FROHAM.	& BROS. COMPANY.
E. D. PRESTON.	

By J. D. Spreckels,
Its President.
Chas. A. Hug,
Its Secretary.

(Corporate Seal.)

We hereby accept the foregoing trust.

BANK OF CALIFORNIA.
S. S. Smith.

No. 2904

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

R. A. GRAHAM,

Appellant,

VS.

THE J. D. SPRECKELS & BROTHERS COMPANY
(a corporation) and the SOUTHERN PACIFIC
COMPANY (a corporation),

Appellees.

BRIEF FOR APPELLEES.

MORRISON, DUNNE & BROBECK,

FENTON, DEY, HAMPSON & FENTON,

Attorneys for Appellees

Filed

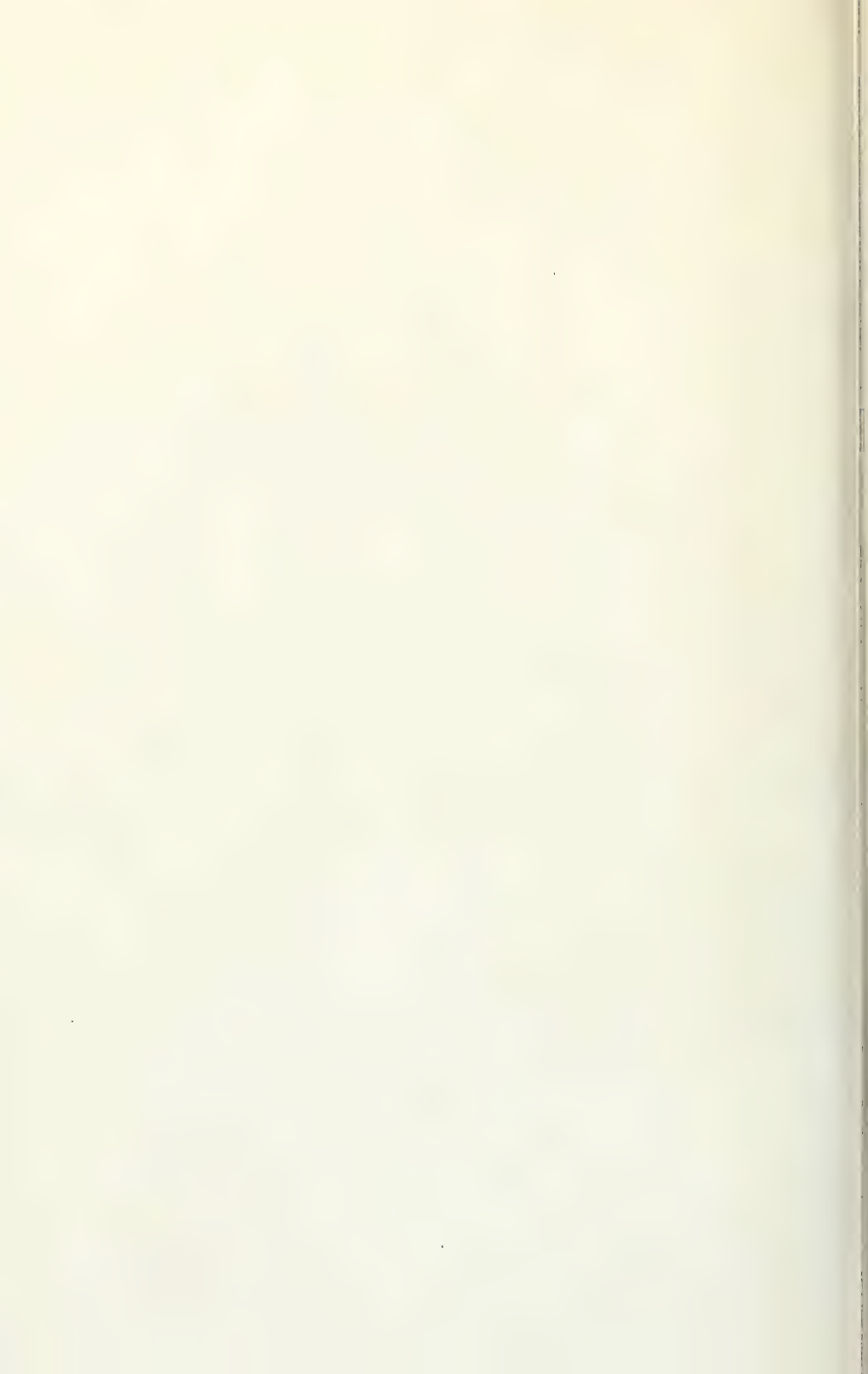
FEB 13 1917

Filed this.....day of February, 1917.

F. D. Monckton,
Clerk.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.



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No. 2904

IN THE

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R. A. GRAHAM,

Appellant,

vs.

THE J. D. SPRECKELS & BROTHERS COMPANY
(a corporation) and the SOUTHERN PACIFIC
COMPANY (a corporation),

Appellees.

BRIEF FOR APPELLEES.

Statement.

On June 8th, 1899, and after negotiations conducted between competent and informed lawyers, representing both sides,—and with the express and avowed purpose on both sides to make an end of all differences,—a final settlement of all matters of difference was signed, witnessed, and delivered. Upon the face and front of the settlement itself, in its opening words, the parties declare:

“That the parties hereto, for the purpose of completely adjusting all matters of difference between themselves, and between each of them, and the Beaver Hill Gold Company, a corporation, and the Coos Bay, Roseburg, and Eastern Railroad and Navigation Company, do hereby agree as follows:”

The transactions of the parties, in the large, had reference to a railroad and a coal mine—a railroad of some 25 or 30 miles, between Marshfield and Myrtle Point, in Coos Bay County, Oregon; a coal mine, the Beaver Hill Coal Mine, in the same locality. The present suit, brought to trial nearly twenty years after, is an audacious and speculative attempt by Graham to rip up that settlement.

This case has been, to the Spreckels Company, a revealing instance of the ancient folly of throwing good money after bad. The Spreckels Company did not become involved in this railroad, or in this coal mine, as a matter of first choice and original investment. Their troubles began in a relatively smaller way, in selling Graham some rails that he was not able to pay for, \$30,000. or \$40,000. worth of rails. The assertion that Graham had put a fortune into this railroad,—\$200,000. in land, and something like the same amount in money,—is preposterous. Mr. Merchant, of Marshfield, gave the land as a subsidy,—Graham admits this (Record, p. 389); it had a value of some \$20,000. or \$25,000., at this time (pp. 565-6); and at the time it was taken over by the Southern Pacific Company in 1906, a value of about \$47,000. (pp. 636-7). As to money, Graham had none (p. 537). "He was not able to pay anything; had no money, in fact; we advanced all the money for the building of the road" (testimony of John D. Spreckels, p. 537).

Neither the road nor the mine was a success. The advances by the Spreckels Company for the railroad, up to the time when they sued Graham on his note

for those advances, had gone beyond half a million dollars.

At the time of the settlement in 1899, the advances to the coal mine were something over \$600,000.00. Mr. J. D. Spreckels gives the story in a few words (pp. 537-8):

“I think I was down at San Diego when Mr. Graham came to me, and wanted to know whether we would import for him or sell him rails for building a railroad in Coos Bay County, from Marshfield to Myrtle Point. I said, ‘What is the situation?’ He said he had a judgment against the City of San Diego for some grading that he had done, amounting to \$30,000. I thought that would be a safe proposition, as the rails he would require would not amount to more than about \$30,000. or \$40,000. I thereupon wrote to Mr. Samuels asking him to give me a quotation upon the rails, which he did. I think then I turned Mr. Graham over to Mr. Samuels. The work proceeded, and we advanced the money. He was not able to pay anything; had no money, in fact; we advanced all the money for the building of the road. Afterwards it transpired that the road would not be profitable. I think it was Mr. Graham who stated that there were some coal lands that could be had, and which, when operated, would supply freight for the railroad, and thereby make it pay; and that failed. In an attempt to save what money we had into it, we went into that scheme, thinking eventually it might come out all right. It went from bad to worse. The mine was, according to reports I had received from time to time, badly handled, and handled by one who apparently did not know how to handle a coal mine. I think in 1899 I made an affidavit touching on the question as to how much money I advanced on the coal mine proposition. At that time all these things were set out when everything was clear in my mind. The affidavit mentions the amount as \$676,146.37, and it is a fact.”

It became necessary to remove Graham as manager of the coal property, and put Mr. Chandler in his place. Mr. Fred Samuels, secretary of the Spreckels Company, testified (pp. 585-7):

“The circumstances under which Graham ceased to be manager of that coal property and how Chandler came up there were that we had six hundred and fifty thousand dollars in there, the amount of coal that was coming out of the mine was simply absurd in quantity, and what was coming was dirt; not only was the coal getting unsalable down there, getting black-eyed, but we had just built bunkers down there costing twenty-one thousand dollars or thereabouts; the coal was getting a bad reputation, and I thought we had gone far enough. I had a meeting with Mr. Graham. I told him this thing was getting to such a point that we simply had to stop, and told him we had better get an engineer up there. I said: ‘You are not a mining engineer, and we don’t know who these men are that you have employed under you.’ The result was that I got Mr. Chandler, after inquiring around San Francisco, to come up to look at the mine and come back and report to me what he thought about it. My recollection is that he came back and reported verbally that the mine was in such a bad condition—at that time there was only one mine, as I understand it No. 1. The expression ‘The Beaver Hill Coal Mine’ really stands for two mines, No. 1 and No. 2. As I understand No. 1 was the one that Mr. Graham opened; afterwards we called the one Mr. Chandler worked No. 2. No. 1 was the mine that was shut down and No. 2 is the mine that Chandler continued to operate through the years. Mr. Chandler came down, and his report was so unfavorable, it just confirmed my fears, that the Beaver Hill proposition was gone unless we did something strenuous about it, such as appointing new management and opening up more coal, if it was possible to do so; for that purpose he was sent up there, to find out whether anything could be done with the property. He came back and said No. 1 mine, the mine that was there then, was practically worthless. I think

he told me that there could be more than about six or seven thousand tons recovered, but by robbing pillars and doing things of that kind, we might get a little more. I would not be positive about that. He made a written report. This is just the substance of what he said. I then told Graham I was going to send Mr. Chandler up. The first time Mr. Chandler went up Mr. Graham expected him. I presume Mr. Chandler went up the second time under my instruction; probably to get a further report under conditions I wanted to be sure about before making any change as manager. After Mr. Chandler came back the second time he told me about this bribe. I didn't pay much attention to that. In view of the fact of the enormous loss, as I considered it, that the whole property practically was worthless, you see, it seemed to me at that time, the thought of the bribe didn't cut much figure with me, or didn't influence me in any way. And furthermore, I was a little suspicious of Graham at that time, and believed it might be possible that he could have done it. In the meantime I had seen Mr. Graham and said: 'Now, Mr. Graham, we have inquired all about Chandler, and we are going to make a change, and it is to your interest just as well as it is to ours, that there should be a change. You are only in this railroad, you have everything at stake up here, and if we are willing to put up more money to try to pull this thing out, surely you ought to be perfectly willing to help us.' He didn't like the idea of being put out as manager. That conversation was some time in November or December, 1897. Mr. Graham said that was all right. He would be perfectly satisfied, 'and go ahead and do what you like about it'—words to that effect; in other words, led me to believe he was perfectly willing that we should put somebody else in there who probably would do better than he could. I suppose my arguments with him at that time, that his interests were at stake just like ours, were potent, and he was perfectly willing to do it. The sequence of events will appear in the books and minutes of the Beaver Hill Coal Company, of which I was secretary at that time. I think it was in December

that we appointed Mr. Chandler manager, and simultaneously removed Mr. Graham as manager."

Mr. Chandler, for the last eight years president of the First National Bank of Marshfield, was the man selected by the company to examine and report on the condition of the mining property under the Graham management. Mr. Chandler, at this time, had been manager of coal mines, with twelve years of experience in the State of Washington and in British Columbia, holding a professional certificate from the Board of Mining Engineers of British Columbia, and serving as an Examiner with the Board for a number of years. On his first visit to the Beaver Hill property, he found the mine in a dilapidated condition, and the underground workings on the west side of the slope practically ruined. A "gob fire" had broken out close to the bottom of the slope, and had not been controlled. There was no available coal except the matter of about six thousand tons, the pillars of the roof were in bad condition throughout, many of them had been withdrawn where they should not have been, it was a case of "robbing the pillars", and the workings in general were of no value at all (pp. 560-562). Mr. Chandler made a detailed report in writing. It appears in his affidavit, part of this record on appeal, and that affidavit "is a correct report of the condition I found there". Graham attempted to bribe him to report favorably to the company on the condition of the mine, and to recommend the purchase of additional properties on which Graham had taken options to himself (p. 562). On taking charge as manager,

Mr. Chandler "got out most of the 6000 tons of coal, and then, when that was taken out, there wasn't anything further left to get but the rails, pumps, and mining appurtenances" (p. 563). Graham, however, was in control of the railroad company, and, concurrently with Chandler's going in as manager, Graham, through his man in charge, J. B. Hassett, doubled the freight rates for hauling coal, and raised the storage charges (pp. 563-4). After two months, Chandler shut down this mine (p. 564). As pointed out in the testimony of Mr. Samuels, No. 1 was the mine that Mr. Chandler shut down. It was Chandler who handled and operated, and continued to operate, No. 2 mine.

But there is something more than mismanagement of the property into which the Spreckels Company was putting its money. Graham had been suspected, as Mr. Samuels testified, of defrauding the company out of moneys for which he had been making requisition. An expert accountant, Mr. W. H. Hamilton, who is now a member of the bar, and Mr. Frank H. Powers, of the law firm of Heller & Powers, were sent up to the mine to investigate the books and papers, and with the result, as Hamilton's report shows, that Graham had been guilty of frauds and embezzlements.

This report of Mr. Hamilton is set forth in his affidavit, which is part of the record (pp. 632, 633, 634, 634 ad. fin.). He arrived in Marshfield, as the affidavit shows, on January 5th, 1898, in company with Mr. Powers. He found Chandler, the new manager, in possession of the coal property, but all the

books, accounts, papers and correspondence of the Beaver Hill Coal Company were in the possession of Graham's man Hassett, in the office of the Coos Bay, Roseburg and Eastern Railroad Company. Chandler, Hamilton and Powers demanded the books and papers, accounts and correspondence, but Hassett refused to surrender them, and declined to let them go out of his custody until he had completed his accounts up to December 31st, 1897. Hamilton was given access to the books, but to none of the correspondence. Hassett told him that he had sent the correspondence out of the State to Graham, at that time in New York, and Hamilton never saw any of the correspondence.

From January 5th, to March 9th, 1898, Hamilton was engaged in examining the books and vouchers: "It appeared", he says, "from an inspection of said books, that R. A. Graham was indebted to the Beaver Hill Coal Company for moneys taken by him from the funds of said corporation". He tells of certain entries made by Hassett "to prevent a disclosure of such indebtedness". From a petty cash book kept by Hassett, it appeared that Graham had taken in cash, from time to time, moneys of the coal company to the amount of \$3000., and that Hassett, afterwards, made an entry in the cash book of the coal company, crediting the company, and charging Graham with \$3000. as "cash loaned to R. A. Graham".

The books of the coal company also showed that Graham had taken for his own use another sum of \$30,000., of the funds of that company. To conceal

this conversion, Hassett made an entry in the books, crediting Graham with \$30,000., for six million feet of logs, at that time in a boom, or subsequently placed there, by the direction and connivance of Hassett. This entry was ante-dated by Hassett more than two months, and was not made in the ordinary course of business, but for the sole purpose of concealing Graham's misappropriation of the coal company's funds. These logs were the property of the coal company. Graham, in 1897, had received from the Spreckels Company \$11,485.15 to pay laborers who had been engaged in logging for the Beaver Hill Coal Company. There were no credits on the books of the coal company for any sales of any of these logs, and there were no other logs in the possession of either Graham or the coal company except the logs which Hassett had entered as a pretended consideration for the \$30,000. Moreover, Hamilton was informed that Graham sold the logs and got the money, but there was no entry of any such transaction in the books of the coal company.

There were other evidences of Graham's indebtedness to the coal company for stores and supplies belonging to that company and diverted by Graham to his own use. Hassett produced a promissory note signed by Graham to the coal company, for \$11,800., which the manager, Chandler, acting under the advice of Mr. Powers, refused to accept.

The books also showed that the coal company's account with the Bank of Roseburg represented a credit of \$1486.14 on December 31st. But the statement made by the bank showed that on January 18th,

1898, Graham had deposited to the credit of the coal company \$27,560.71, and that on December 31st, 1897, the coal company was overdrawn at the bank in some \$28,000., notwithstanding that the account as kept at Marshfield showed a credit balance of \$1486.14.

“The examination of the books and vouchers by me,” Mr. Hamilton reports, “disclosed false and fraudulent entries made by the connivance, direction and instruction of J. B. Hassett, whereby large sums of money belonging to the Beaver Hill Coal Company, the corporation defendant, had been diverted to R. A. Graham, and had been by said R. A. Graham appropriated to his own use.”

The result of Mr. Hamilton's examination established an indebtedness of Graham for misappropriated funds of the Beaver Hill Coal Company, in excess of \$70,000.

Mr. Hamilton further reported:

“The books of account kept by said Hassett for the Beaver Hill Coal Company, under the direction of said Graham, plaintiff, as manager of Beaver Hill Coal Company, were improperly and irregularly kept. Ledger accounts were opened which were incomplete in form and substance, and it became necessary to refer to vouchers and bills and papers outside of the books, to attempt to follow or trace many transactions of which no information could be obtained from the books themselves. False and improper entries frequently appeared in the ledger accounts. It was the custom of said Hassett and said R. A. Graham, manager, to use the funds of Beaver Hill Coal Company and the Coos Bay, Roseburg and Eastern Railroad and Navigation Company, and their own funds indifferently, there being no segregation thereof; but all funds in the bank at Marshfield were kept in the name of J. B. Hassett, and were distinguished as J. B. Hassett No. 1, and J. B. Hassett No. 2, and J. B. Hassett No. 3; and the bank at Marshfield refused to recognize any account whatever with the Beaver Hill

Coal Company, or that it held any funds of such company."

Mr. Powers testified to his visit to Marshfield in company with Mr. Hamilton. He tells of an interview that he had with Hassett, "asking for explanation concerning certain items that seemed improper and unfair" (p. 624). He states that one of these

"was the matter of six million feet of logs; the other was a matter of taking down certain money for the purpose of paying life insurance, and another was for drawing down one thousand dollars to pay Myrick & Deering apparently for services to be performed for Mr. Graham in order to antagonize the work that I was then doing; another was an attempt to have us accept a note of Mr. Graham in place of cash, that apparently should have been shown, a note of somewhere in the neighborhood of \$11,000.; also that Mr. Hassett was charging Mr. Hassett's salary, half to Graham and half to the Beaver Hill Coal Company; I couldn't see where he performed any services for Beaver Hill Coal Company, and asked for an explanation of it: and in that explanation Hassett made such statements as appeared to me to make it impossible for him to be a fair receiver" (pp. 624-5).

Mr. Powers tells of the credit that Hassett was asking for, in \$30,000., as to the logs. From the figures given to Mr. Powers, these logs had cost in the neighborhood of \$2. or \$2.50, and were apparently being disposed of for Graham individually, at a profit to Graham of two or three dollars a thousand. "I objected to the item of \$30,000., and he tried to explain that to me, but couldn't" (p. 625). Mr. Powers further tells of a discrepancy of some five or six hundred thousand feet of logs. Hassett said the logs had been

shipped to one of the Spreckels companies at San Diego; there was a controversy as to whether the logs belonged to Graham or to him. But Mr. Powers says that, from what the experts had given, there was apparently a shortage of 600,000 feet. Mr. Powers tells, also, of Hassett's withholding moneys to pay a premium on life insurance, when the premium had not come due; and of another item of \$4000., also for future money to be paid.

“The idea of taking cash out of the Beaver Hill Coal Company, and accepting Mr. Graham's note, in order to anticipate certain future payments, was impossible for me to understand, and I refused to accept it otherwise than it was an improper action on the part of Mr. Hassett, and indicated that Mr. Hassett was not a man of the frame of mind who could act as a receiver” (p. 626).

In the affidavit made by Mr. Powers in the receivership proceeding for the ousting of Hassett, the details are more fully stated, and Mr. Powers testified at the trial that the facts in such affidavit were true as he understood and expressed them (p. 626). He goes into detail as to the \$30,000., charged for logs. He says:

“This cash book and the vouchers were none of them entered at the dates of the transactions and the assistant bookkeeper informed that sometimes the cash books would not be entered up for 2 or 3 months, in this way Hassett was enabled to and as I am informed and believe did use the funds of the Beaver Hill Company for Mr. Graham's private business and the railroad business, without being compelled to enter the transactions in the books of the company. This \$30,000. transaction was one of such. I asked Mr. Hassett why the Beaver Hill Company needed 6 million feet of logs at that time,—he replied to me ‘Virtually they were Beaver Hill

logs all the time.' Then I asked 'Why were they not placed on the Beaver Hill books?' He replied and I took the reply down in writing at the time, 'When Graham wanted to use any money for logs he charged himself with the money.' I asked—'Took the money from the Beaver Hill Coal Company as requisitioned by you from Spreckels?' And he replied 'Oh, yes, and we made requisitions for and specifically said it was to pay loggers.' I then said '*As a matter of fact, they were Beaver Hill Company's logs and the first showing in the books is this \$30,000.?*' And Mr. Hassett answered '*In the rough, yes*'. During my recent interview with Mr. Hassett on June 15th, 1898, he said to me 'I always gave Spreckels a fair deal.' And I replied to him 'When Mr. Graham's individual interests were at stake I think you always made mistakes in Graham's favor.' To this he replied 'Show when.' I thereupon replied 'You turned over a book of logs in December and guessed that they contained 6,000,000 feet when the present figures show only about 5,400,000 feet?' He answered 'The balance of the logs were cut up into lumber and sold the Spreckels Commercial Company in San Diego', thereby admitting but for the San Diego sale he had overcharged 600,000 feet. I know that Graham has within one month claimed that the San Diego shipment was his private account and that he attempted to pay over \$2,000. interest due from him personally to J. D. Spreckels & Bros. Company for the May interest on his note to them for \$523,162.52 by the use of the credit of that San Diego shipment claimed by Mr. Hassett to be Beaver Hill Company's logs. At said interview on January 7th, 1898, said Hassett said to me that the logs cut from the Beaver Hill property were intermingled with the logs bought by Graham and that there was no means of identifying the lumber from logs grown on Beaver Hill land and other logs and admitted that Mr. Graham still owed for certain stumpage to Beaver Hill Company for logs cut on their land. I then asked him why Beaver Hill was charged from \$2. to \$3. a thousand more for logs and lumber bought from Graham than current cost cash rates at Coos Bay, and he replied that it was not so,

adding 'The thing is supposed to be net,—it is as near as can be figured, that is the orders Graham gave me.' I am informed by experts who have examined these logs in the boom covering this \$30,000. transaction and I verily believe that nearly all over 95 per cent of these logs are pine and fir and cost and are of the value of from \$2.50 to \$3.00 per thousand and that Graham never paid over \$3. per thousand including freight and stumpage for such logs and the said logs though bought with Beaver Hill money in order to make good the shortage which showed on Graham's account at the time of his discharge was by said Hassett, the present receiver of defendant corporation property, accepted and credited by said Hassett at the rate of \$5. per thousand on a guess as to quantity which when measured was, as I am informed by experts and believe, 600,000 feet over the amount actually in the boom. And this notwithstanding the fact that Graham told him to charge neither profit and loss and while the logs received by Graham from Beaver Hill lands were unaccounted for by him or his bookkeeper Hassett."

Mr. Powers goes into detail, in his affidavit, as to the note for \$11,800.00.

"Another item in said cash book was a note for \$11,800. dated Dec. 1st, 1897, executed by said Graham to Beaver Hill Coal Co., payable one year after date. I learned that this transaction had been carried on by Hassett & Graham long after and not before his discharge as its date seemed to indicate. On January 7th, 1898, I asked Hassett, now receiver, when this note was given. He looked at it and replied 'December 1st'. I said, 'I see it is dated then, but when was it actually signed?' He replied, 'About the time of its date'. I then showed him that it was entered in the cash book at a date which would necessarily make it about December 24th, 1897. He then said that he remembered that it was executed some time along about December 15th, or 20th, and that it was antedated for convenience of bookkeeping to December 1st. The cash book showed as contra to this note one voucher over a year old, for

\$1476.85 explained as money used to pay Graham's life insurance policy which Hassett said Spreckels had agreed to; another item of \$3100. was on a voucher dated February, 1897, and reference to it was 'R. A. Graham open \$3000. cash loaned account No. 1 (verbal order J. B. H.)'. Mr. Hassett was unable to give any clue as to what these items were that constituted the loan and notwithstanding that reports were made to the San Francisco managers each month since February, 1897, no report was ever made of said loan. Another item included in the \$11,800. note was \$2950. which Graham wanted to borrow to pay his insurance which was about to come due, and an item which Mr. Hassett was unable to explain other than the entry 'For Graham's future credit \$4019.75.' "

Mr. Powers, *inter alia*, tells of a \$5000. credit:

"On January 7th, 1898, Hassett called up a matter of a credit which he claimed for Mr. Graham amounting to \$5000., saying it was an overcharge of interest. I then called his attention to the fact that he had already attempted to insert it in a trial balance of Dec. 1st, 1896, and from that time on till September, 1897, and that Spreckels' treasurer had written asking an explanation and that it had been dropped."

He tells, also, of the juggling of the bank accounts, to which Mr. Hamilton also spoke. Mr. Powers says in his affidavit:

"On January 7th, 1898, said Hassett explained to me that he made out requisitions on behalf of the Beaver Hill Coal Company on J. D. Spreckels & Bros. and thus obtained a cash deposit in the Roseburg Bank for the company on its credit. That he had one account under three heads in the Flanagan & Bennett Bank at Marshfield, known as Accounts J. B. H. No. 1, whereby he transacted Graham's private business; J. B. H. No. 2 whereby he transacted the Coal Company's business; and J. B. H. No. 3 whereby he transacted the railroad's business. As soon as the money would come to the

Roseburg Bank through account No. 2 he would get it to the Marshfield Bank. I was informed by Mr. Flanagan, of Flanagan & Bennett, that Mr. Hassett had arranged to have all three accounts considered as one and that each should be responsible for the other so that as long as there was any money in one there could be drawn an equal amount in the other. I questioned Mr. Hassett about it on January 7th, 1898, and he admitted the facts and I then asked him the question 'If, for instance, No. 1 has \$10,000. on hand and No. 2 is overdrawn \$4000. and No. 3 is overdrawn \$3000., how much would J. B. Hassett have in bank?' To this said Hassett, now receiver of No. 2, replied, 'In that case \$3000. but these figures are altogether too high, because on the average I would have on hand from \$800. to \$2000., and by means of having these three accounts and a friend over in Roseburg I was able to have a few dollars on hand and keep either account from borrowing money from the bank in a pinch. The one thing I would try to do would be to save Sheridan in Roseburg.' I am informed and believe that by the use of these three accounts said Hassett diverted large sums of money from the account of said Coal Company to that of Graham and the railroad in the following manner: Said Hassett would by draft on Roseburg through J. B. H. No. 2 place all the money of the Coal Company in his account—personal—at Marshfield subject to be borrowed by said Graham without appearing on the books through overdrafts on account J. B. H. No. 1, which was secured by No. 2. In this way I am informed and believe Hassett would overdraw for Graham to buy logs at from \$2.50 to \$3. per thousand with money guaranteed by Beaver Hill Coal Company's account and then sell the logs to the Beaver Hill Company as lumber at rates which would give Graham a profit of from \$2. to \$4. per thousand and thus by the time the new trial balance would come around the payment of the lumber would make up the overdraft in No. 1, and exhaust No. 2 until replenished by the Spreckels people for Beaver Hill Coal Company."

In this same proceeding—it was before Judge Bellinger of the United States District Court,—being the Graham suit against the Beaver Hill Coal Company, in which the state court appointed Hassett, *ex parte*, as receiver, the cause thereafter being removed to the federal court—further evidence was introduced on the application to oust Hassett as receiver. The affidavits of J. D. Spreckels, A. B. Spreckels, F. S. Samuels, W. D. K. Gibson, F. J. DeNeveu, C. H. Merchant, D. L. Watson, John Curran, Alexander Love, Joseph Grundy, Frank Chapelon, W. J. White, John Rosby, and L. A. Lewis went in evidence. They go to the dealings between the parties, Graham and the Spreckels Company, to the mismanagement of the property by Graham, to his relations with Hassett, to his irregularities and misappropriations, and to the worthlessness of the coal mine which Chandler was compelled to shut down. They are particular and detailed, many of them, to a degree. It is unnecessary to examine them at length; it would not bring coal to Graham's coal mine, but it would be bringing coals to Newcastle. The result of it all was, that Judge Bellinger turned Hassett out, and put Mr. Catlin in as receiver.

These affidavits are indicated, in the printed transcript, as having been read at the trial, but are not printed *in extenso*. They are a part of the record in the cause, however, and are brought here with the original judgment roll in this receivership case. It will be understood, as a fact, that it was Graham, not the Spreckels Company, that precipitated the litiga-

tion between the parties. Graham had been removed for mismanagement from the control of the coal property. He could not be removed from the railroad, because the directors were his creatures. He knew that he had been guilty of frauds and embezzlements, and that investigation would come. Ousted from the coal company, he seeks to get back, through his man Hassett, and his method was, to bring this receivership suit in the state court, and have Hassett appointed receiver, with full powers, on an *ex parte* order. It was in the proceeding by the Spreckels Company to get rid of Hassett, a proceeding that had the countenance and final approval of Judge Bellinger, that these affidavits were filed. They exposed the real situation. They dispose of Graham's mendacious and shameless charge of oppression. They reveal who the victim was in these transactions between the parties. They are evidence as *res gestae*, part and parcel of the history made between these parties, and they demonstrate the good faith and the long suffering of these appellees (pp. 483, 484, 306).

It was not until Graham had begun this receivership suit, that the Spreckels Company went into the courts at all. The revelations of the receivership suit were what led to the accounting suit brought by the Beaver Hill Coal Company against Graham for an accounting, in which he was proceeded against for these misappropriations and embezzlements. He talks of an article in the San Francisco Bulletin, relative to this accounting suit and to the charges against him therein made. He makes no attempt to connect these appellees with

the publication of that article, and the newspaper was within its rights, for the suit was public property. But he pretends to say that this article was made prominent by being posted on the building and windows of the company's office at Marshfield. He is flatly contradicted by Dr. Mingus, of Marshfield, who was at the building practically every day (pp. 630-631); and this is a part of the "oppression" alleged.

As Graham and his directors were in control of the railroad which the Spreckels Company had built, and into which it had put so much money, suit was also brought by the Spreckels Company for relief, including a receivership, against the Coos Bay, Roseburg and Eastern Railroad and Navigation Company, in the Circuit Court of the United States, for the District of Oregon; and finally, we have the suit for a foreclosure and sale of the securities, in Judge Bahr's Court, the Superior Court of San Francisco, brought by the Spreckels Company on Graham's note for \$523.-162., advances and interest. Pursuant to the contract of the parties, 5% commission was charged against the advances, and interest was adjusted, as upon all accounts of the company, quarterly (pp. 629-630). It is now complained of, we presume as being "oppression", that this interest was reckoned and adjusted quarterly. But Graham does not deny any part of the amount and indebtedness of this note. On the contrary, he admits it, under oath, in writing, and in his amended complaint in this case. In paragraph V of that complaint, page 22 of the printed record, he says:

“On the first day of November, 1897, as a result of the various business enterprises in which the defendant, J. D. Spreckels & Bros. Company, and plaintiff were jointly interested, there became due and owing by the plaintiff to the said defendant, the sum of five hundred twenty-three thousand one hundred sixty-two and 52/100 (\$523,162.52) dollars.”

This note was a consolidation of the original and relatively small notes given by Graham when he first got the rails from the Spreckels Company, and of the further advances thereafter made to build the road to Myrtle Point. Beyond that point, though there had been some talk about extending the road to Roseburg, there was no understanding for any advances, the Spreckels Company “didn’t agree to that at all” (p. 547). The note of November 1st, 1897, for \$523,162.52, was secured by ten thousand and one shares of the capital stock of the railroad company, 620 of the bonds, a deed of the Marshfield land which Mr. Merchant had given as a subsidy; the company also held an insurance policy. Graham does not attempt to deny this:

“At the time that the book account was consolidated into the note of November 1, 1897,” he testified, “the Spreckels were holding the stocks, the bonds, the Marshfield deed, and the insurance policy.”

Graham would now pretend, by way of “oppression”, that there was a broken understanding in respect to the signing of this note—that he was to receive back twenty-five hundred out of five thousand shares, of the Beaver Hill Coal Company stock, and the insurance policy just mentioned. He selects Mr. A. B.

Spreckels, who was prevented, by a paralytic affliction, from testifying, but the taking of whose deposition, at serious hazard to him, was tendered to, but not accepted by, the plaintiff (p. 542),—as the one with whom the alleged understanding was had. But the Beaver Hill stock never had been held as security for the obligations gathered up into this note; there was no reason why it should be given back; and as to the insurance policy, it was held by the Spreckels Company, provided for and secured by, and securing, the payment of the premiums which the company was making (p. 583). Graham did not own any part of the Beaver Hill stock, he had no right to it. The property was bought and paid for by the Spreckels Company. It was expressly agreed in writing between Graham and the Spreckels Company “that the entire capital stock of said company (Beaver Hill Coal Company) is to be held *and owned* by the parties of the second part”—this is the so-called Norman agreement, Graham being the first party, and the Spreckels Company the second parties—

“until such time, as has been hereinbefore provided, that the surplus profits exceeded the sum necessary for the liquidation of interest, and any indebtedness of party of first part to parties of the second part has been cancelled; *then* one-half of the capital stock shall thereupon become the property of the party of the first part, and is to be transferred to the party of the first part or his assigns” (p. 248).

Although Graham saw A. B. Spreckels again, the next morning, after this pretended understanding, there was someone else present at that time—J. D. Spreckels,

who was able to testify and did testify at the trial. Graham will not say that when J. D. Spreckels was present that next day, there was a word said about returning the Beaver Hill stock or the insurance policy.

“I have no separate recollection”, Graham testifies, “that, in that conversation and in the presence of J. D. Spreckels, I made any reference to the statement that my Beaver Hill stock and insurance policy were to be returned to me at Marshfield” (p. 390).

And Mr. J. D. Spreckels testified:

“I never at any time, nor did my brother A. B. Spreckels ever at any time, in connection with the making of this five hundred thousand dollar note promise Mr. Graham that I would send him half of the Beaver Hill stock, and any life insurance policy. I was never notified in the course of the business of J. D. Spreckels & Bros. Company that any such promise had ever been made. My brother and I discussed not only this, but every matter in the operation that came up in our line of business, and that was thoroughly discussed between us, everything that occurred in relation to the Beaver Hill Coal Company, and also the railroad” (pp. 539-540).

This oppressive breach of an understanding that never was had, is one of the things that Graham “refreshed” himself upon, from the “diary” that he keeps. He makes testimony—and we shall illustrate it further—as he goes on. For this record shows that he is a professional litigant, that he has been in one litigation after another in respect to these properties and transactions, and that in every instance he has failed—including the verdict of an Oregon jury, in an action brought by him against the railroad company for alleged salary, which was tantamount to a finding that Graham had committed plain perjury (p. 375).

Now, then, on April 27th, 1898, he proceeds to make evidence by writing to the Spreckels Company as follows:

“When I gave the note to you on November the 1st last it was agreed between your Mr. A. B. Spreckels and myself that my stock in the Beaver Hill Coal Co. was released from any further claim upon it, and that the life insurance policy assigned to you would be transferred back to me. I have not received the stock nor the policy. Please deliver them to the bearer for me” (p. 390).

On the very same day, without any loss of time, Graham got the following answer:

“Dear Sir:

Replying to your memorandum of 27th instant, regarding Beaver Hill Coal Company's stock and life insurance policy, I have to say that there was absolutely no such understanding, or even a conversation in regard to the transfer of stock or life insurance policy to you.

Yours truly,

A. B. SPRECKELS” (p. 391)

There was a proposition, however, from Graham in respect to the Beaver Hill Coal Mine, which Mr. Samuels refused and “killed”. Mr. Samuels tells about it (pp. 602-3):

“Mr. Graham after he came down we were beginning to find out that he was stealing our money—to speak plainly; that he would requisition on us for sums of money which he would divert for other purposes. After the note was signed, or before, Mr. Graham came to us with a proposition that he had made out by Mr. Deering that if we would give him—I think about seventy thousand dollars, and let him have the mine for one year, if he didn't make the mine pay he would step out. In other words, he wanted us to make him a present of \$72,000. or something like that, and turn over our

property to him, and at the end of a year we would get back the shell, if we got back anything; that was the proposition that came to me, and I flatly refused to have anything to do with it. Mr. Graham brought the proposition to me. It was about that time in 1897. I could not say where he talked to me about this. I don't think Mr. A. B. Spreckels was present with Mr. Graham and me. I will concede this: If we had taken that to Mr. Spreckels and Mr. Spreckels had spoken to me about it, I would have flatly objected—Mr. Spreckels could have done what he pleased, but I certainly would have flatly objected. If Mr. A. B. Spreckels had promised to advance sixty-five thousand dollars to Mr. Graham and had agreed to keep him in as manager for a year, you bet I would have killed it if I could. As a matter of fact I did kill such a contract, otherwise it would have been signed.”

We have some idea, now, as to what the Spreckels Company spent and endured in respect to the Beaver Hill Coal Mine. We know, now, what the company advanced to build the railroad. Those advances were represented by book account except as to the two notes given at the start for the first rails. This account was secured by ten thousand and one shares of the railroad stock, 620 of the bonds, and the Marshfield land;—the self-same securities that went under the note. The note itself was only a change in form of the liability, and it had the effect of extending Graham's time to pay for six months. It was drawn up on the advice of Mr. Preston, the company's attorney (pp. 582, 601). Graham signed it, and he admits, in his amended complaint, that he owed it. For several months he paid the interest.

No suit was launched against him on the note, until after he had brought this suit against the Beaver Hill

Coal Company, in which he had Hassett appointed receiver. Nor was any suit brought against him on the note until after he stopped paying interest. And he undertook to use, for the payment of interest, property of the company—these very logs concerning which we have called attention to the testimony of Mr. Hamilton and Mr. Powers. We quote the testimony of the secretary of the company, Mr. Samuels:

“We didn’t commence to sue him until after he stopped paying interest on the note. I don’t think he was paying interest at that time except as it was charged against him on the open account. I think it was charged right on the open account. When he had become 60 days in default on a disputed payment of interest on the note, I launched suit against him for the foreclosure of these securities, after 60 days. We could have done it within 30 days. We had a reason for doing it then. At this time Mr. Graham had a dispute with me as to whether or not there was a credit in our hands for logs shipped to the Spreckels Bros. Commercial Company. We had collected that money from Spreckels Bros. Commercial Company, and would not pay it to him on his note. We did not subsequently admit that he was entitled to it. We told him there was no money due him. I certainly wish to state that he was not entitled to the proceeds that had come into our hands from the Spreckels Commercial Company on those logs, because those logs belonged to us. We paid for sawing them. We hadn’t proof at that time that those logs came off the Beaver Hill Coal Company’s lands, but we had a strong suspicion that they had. They came out of the Beaver Hill Coal Company’s beam. I don’t know that these logs had been individually purchased by Mr. Graham with his own funds up the river, and put into the book and marked with a separate mark. He requisitioned on us to cut logs for the Spreckels Commercial Company shipment; also for the labor attached to that, which he paid Seeley for cutting our logs. He would charge us for cutting the logs, charge us for sawing

them up; then he would sell them back to us; and that is what accounted for what he sold to this Spreckels Brothers in San Diego; we had this item in his requisition account, requisitioned from him" (pp. 613-614).

Suit was accordingly brought to foreclose on the note and securities. The very purpose of that suit was to end the security, as such, to apply it on the obligation—not to continue it. Mr. Preston represented the plaintiff, the Spreckels Company; Graham was represented by Mr. Isaac Frohman, from Judge Garber's office, and by Mr. A. A. Moore. After the case had been on trial for something over 20 days, a proposition came of settlement—not from the Spreckels Company, at all, but from Graham. Mr. J. D. Spreckels testified (p. 541):

"Referring to the agreement of June 8, 1899, I recall generally the circumstances that there was a suit pending in the Superior Court to foreclose the lien or pledge of these securities. I recall also that in that agreement a judgment of foreclosure of that very lien and pledge was provided for, the judgment to be stayed for six months. I knew Harry T. Creswell. He was a friend of mine. He was a member of the firm of Garber, Creswell & Garber. I think I had a conversation with Harry T. Creswell prior to the settlement of June 8, 1899, in which he talked with me about this litigation at the club on one occasion; at the Pacific Union Club, in San Francisco; he says: 'Why can't we settle this thing, and settle it for all?' I said: 'Well, if it is going to be settled, *it has got to be settled for all.*' Then I said: 'I don't want to engage in any settlement. We will go and talk it over with Mr. Preston.' That was the first suggestion to my knowledge looking to a settlement of this matter."

Mr. Isaac Frohman, of the California bar, who was Graham's counsel in the foreclosure suit on the note,

and who actively represented Graham on the final settlement, was a witness in this case, called by the Spreckels Company. Mr. Frohman gave his testimony in San Francisco, by deposition. The deposition is in the record, pages 515-535, and is interlarded with objections, on the part of Graham, to the development of the evidence. Of this, more anon. Mr. Frohman says (pp. 519-21):

“The circumstances leading up to the execution of the agreement were that when the case was on trial about twenty-eight or thirty days, the trial was suspended, negotiations were opened between R. A. Graham and J. D. Spreckels & Bros. Company mainly by E. F. Preston, and those on behalf of R. A. Graham being conducted mainly by me. As a result the agreement of June 8th, 1899, was entered into and executed. I certainly had more than one conversation with Mr. Preston relating to or looking forward to the execution of this agreement. I had several such conversations, I suppose. I met with the experience that an attorney usually meets with when he is negotiating with the attorney of his adversary, as to matters pertaining to the disposition of pending litigation and controversies. The agreement in question dated June 8, 1899, is the expression in terms of the result of those negotiations. In addition to the suit of J. D. Spreckels & Bros. Company v. R. A. Graham, there was then pending between these two parties various controversies. Mr. Preston stated that if the pending suit of J. D. Spreckels & Bros. Company against R. A. Graham, was to be settled, he wanted to have settled all matters in controversy between the parties, and certain corporations in which they were interested. I believe one was called the Beaver Hill Coal Company or the Beaver Coal Company, and the other the Coos Bay, Roseburg & Eastern Railroad Company. You have handed to me three papers which were the outcome of the negotiations that I have referred to. I think there were a number of others which were ultimately drawn up and made with the approval of the

attorneys for both sides, I mean by that, E. F. Preston, W. L. Pierce on the one side and the attorneys representing R. A. Graham on the other, and I must modestly say when I speak of the attorneys representing R. A. Graham, that I had the brunt of the work of the drawing of the papers and the negotiations to bear. I cannot sum up in a sentence or a page all that I said to Mr. Preston. There were numerous conversations, and they all had to do with the phraseology of the agreements, and they had to do with the objects set forth in the agreements and other documents involved. The matter of statements that may have been made to me or that I may have made to Mr. Preston do not remain in my memory. To the best of my recollection I said to Mr. Preston that he should draw up such papers as he would require to be executed, and that I would go over them with Mr. Graham. I believe that that is the turn the thing took, that he first drafted the papers he wanted executed. I should say that this agreement may have had that general form when first presented. The agreement is the outcome of those discussions. I looked over the agreement. I do not recall any reservation in my mind as to whether the language of that agreement meant something different from what it purports to speak. I can recall no reservation in my mind on that subject. I do not think Mr. Graham would have signed it if I had told him not to. So I should assume that I told him and that I advised him to sign it."

Indeed, it came out as part of the plaintiff's case, and as coming from Mr. Frohman himself, "that the agreement he proposed would be so fairly and plainly drawn that neither party could wriggle out of it" (p. 480).

Now, in his complaint, Graham had alleged, in respect to the settlement of June 8th, 1899, that he had been advised by his counsel, that it was a mortgage, a continuing security. On the witness stand, during

direct examination, he named John Garber, as having advised him "that this instrument constituted a mortgage, before I signed it" (p. 339). Judge Garber was then dead—there was no fear of contradiction from that source. He admits that Judge Garber never attended court at any time during the trial of the case, that it was Mr. Frohman who actively conducted negotiations for the settlement with Mr. Preston, and that it was by Mr. Creswell that the first suggestions of a settlement were made (p. 429). But he was not asked on direct examination, as to whether Mr. Frohman had ever advised him that this settlement was only a mortgage. Mr. Frohman was still alive. But that precise question was put to Graham on his cross-examination, and he had the assurance to testify that "Mr. Frohman told me that that instrument was a mortgage during the making of the instrument" (p. 432).

Now, then, Mr. Frohman's attention was called, at the deposition, to Graham's allegation as to the "continuing security" of this final settlement (p. 521). And Mr. Frohman was asked whether he had advised Graham on the subject. Repeated and insistent objections were made on behalf of Graham, that Mr. Frohman, if he testified, would be violating a professional confidence. Finally, Mr. Frohman, "in view of the fact that objection is raised by Mr. Graham's counsel to the question," declined to answer (p. 529).

Graham's testimony at the trial removed any possible objection to the evidence sought to be elicited from Mr. Frohman. Appellees then requested Mr. Frohman

to come to Portland. Even then, Mr. Frohman felt a delicacy about testifying against his former client, however constraining in law and ethics the reason now was that the truth should be told. The upshot of it was, that appellees consented to take the statement of Mr. Frohman by telegram; and thereupon a telegram to Graham's counsel from Mr. Frohman was read in evidence as follows, with the understanding "that if Mr. Frohman was present, he would so testify". "My best recollection is", says Mr. Frohman, "I did not advise Graham agreement constituted a mortgage" (p. 536).

The final settlement of June 8th, 1899, was made. The parties themselves did not meet, were not on speaking terms. The negotiations were tendered by Graham's counsel. They were conducted between the attorneys for the parties, mainly by Mr. Preston and Mr. Frohman. The purpose avowed on all hands, and the thing intended to be done, was to effect a final settlement, to make an end of everything; not to continue and protract a mortgage then in process of foreclosure, to be foreclosed all over again at the end of six months. The law must be weak indeed, and courts must be powerless, if such a settlement can be stultified and stricken down.

The settlement having been made, Graham pretends that the Spreckels Company tried to thwart it. He gives a mythical conversation, at the time of the settlement, which he claims to have had with C. P. Huntington, who, like John Garber, is dead. Huntington is represented as having said to Graham:

“Well, don’t agree to anything less than six months. Get more time, if you can, but if you can’t get but six months, why that will do. We will have to settle.”

And the Southern Pacific Company was to advance Graham \$550,000 (p. 335). This is the second dead man’s conversation. George Crocker is also brought in—another dead man. He was to look into the matter with Graham, but later he was not friendly, and told Graham that Mr. Preston had advised him not to buy the road from Graham, it would be buying a lawsuit, and the company could get the property cheaper later on (p. 341). Huntington comes in again, this time in New York, tells Graham that Crocker is not friendly, and advises Graham to see Speyer in London. A letter from Huntington to Speyer is mentioned, but is never produced (pp. 345-6). Again, Huntington is seen in New York, and,—shades of Baron Munchausen!—this time in company with Russell Sage, and it appears from the “diary” that Huntington, Russell Sage, and Graham argued the matter over until half past 2 o’clock in the morning at Russell Sage’s house, “and Sage agreed to take a million of the bonds if *we* would take the balance, and Huntington promised Sage he would try to have the S. P. take the balance” (p. 346). It is needless to say that Russell Sage is dead—whether his death was in the nature of an untimely taking off, superinduced by sitting up until half past 2 o’clock in the morning with Graham and Huntington, “mulling over” this 25-mile railroad, is a problem which this record does not resolve.

One living man, however, is named, Mr. Samuels, Graham says that he told Samuels about Preston "knocking" him with Crocker and the Southern Pacific, and that Samuels told him Preston would have to quit. This delicious morceau comes from the "diary" (pp. 342-3). Mr. Samuels explodes the story. He says, precisely and categorically that it is "absolutely untrue" (pp. 589-590, 590-591). Mr. J. D. Spreckels likewise disposes of the story (p. 556); and also disposes of any pretended negotiations with Harriman, another dead man (pp. 556, 558). Graham again refers to his diary, in respect to J. D. Spreckels, and is able to "refresh" his memory as to having seen J. D. Spreckels in December, ¹⁸⁹⁴~~1900~~, at the office of the Farmers' Loan & Trust Company in New York, and asking him there if he thought he should let Preston carry on a warfare against Graham. This is the extract from the diary:

"Seen J. D. S. at the Farmers' Loan & Trust Company's office. I asked him if he thought he should let Preston carry on a warfare against me. He said Preston was without authority to talk. I told him authority or not, the result was the same. He said he would see Huntington as they needed the money" (p. 449).

But the diary is met by a living witness. Mr. J. D. Spreckels testifies that he was not in New York at the time in question, that he was not there until 1900, and that he has never been inside the office of the Farmers' Loan & Trust Company (pp. 542-3). The Graham diary also contains the statement that J. D. Spreckels, according to Graham's information from Mr. Marsden, president of this trust company, was in New York trying to sell bonds for his steamship line

(p. 448). Another fiction. Mr. Spreckels "made no attempt to get any bonds placed in any corporation or any banking house or any place in New York,—those bonds were all placed in San Francisco, and placed there by myself". And finally, as to Preston and the alleged obstruction or "knocking", and the entry or entries in the "diary" Mr. Spreckels gives this categorical testimony (pp. 540-541):

"Q. Mr. Spreckels, at any time, did you ever have any conversation with R. A. Graham in respect to Mr. Preston interfering with any transaction in any way between Graham and the Southern Pacific Company?

A. Well, that was a period after the litigation.

Q. We will take the period—I will draw your attention to the point of time subsequent to the settlement of these matters on June, 1899.

A. I was not on speaking terms with him, even.

Q. It has been said here by Mr. Graham that he had a conversation with you at the Waldorf-Astoria Hotel in New York in which the subject matter of Mr. Preston interfering with his dealings with the Southern Pacific Company looking to a disposition of the railroad properties involved in the Coos Bay situation, and that you said to him that Preston had no authority to interfere with him, or that business. Did any such conversation take place?

A. No, that is absolutely untrue.

Q. Did you ever at any time authorize Mr. Preston to go to Mr. George Crocker or Mr. C. P. Huntington, or anybody connected with the Southern Pacific Company, and notify him, it or them that if they should take over in any way this property involved in the Coos Bay situation, that they would be purchasing lawsuits?

A. I did not.

Q. Did you ever authorize or instruct Mr. Preston to make any statement of any kind touching any matter involved in the settlement of June 8th, 1899, to the Southern Pacific Company, or anybody connected with it?

A. I did not.

Q. Did you ever know from Mr. Preston that he had ever done anything of that kind?

A. I never knew.

Q. Did you ever hear until the litigation here, that such a thing was ever claimed?

A. I did not."

Some attempt was made at the trial to carry the impression that when the Spreckels Company took possession of the railroad company's office, pursuant to the final settlement, a sort of military descent, with force and arms, and circumstances of terror was made upon the office, and upon Hassett, who was in charge. The reading of Hassett's testimony, taken by deposition, shows the whole thing to be a figment (pp. 495-8). Mr. Chandler took possession quietly and peaceably and Hassett was permitted, as we have already noticed, to use the office for some ten days or two weeks after Chandler went into possession. On the occasion in question Chandler was accompanied by Judge Coke, afterwards Judge of the county, by the sheriff of the county, and two detectives, and by Dr. Mingus (pp. 499-501 and 630-631).

So much for the "oppression" by these appellees in employing Preston to thwart the final settlement. The incompetency of the testimony itself requires no argument. The character of the testimony is written on its face. Judge Garber, Huntington, Russell Sage, Harri-man, George Crocker, Preston,—“the voices of the dead”. An attempt to put parol declarations, long anterior to the trial, into the mouths of dead men, “cannot be too carefully scrutinized by courts and juries” (*Davis v. Davis*, 26 Cal. 23, 44). The language

of Chief Justice Currey, in the case just cited, is comprehensively applicable to Graham's testimony. It is language that has become standard in the books:

"In all cases it is the most dangerous species of evidence that can be admitted in a court of justice, and the most liable to abuse. In most cases it is impossible, however honest the witness may be, for him to give the exact words in which the declaration or admission was made. Sometimes, even the transposition of the words of a party may give a meaning entirely different from that which was intended to be conveyed. The slightest mistake or failure of recollection may totally alter the effect of the declaration or admission. *And more than this, it is most unsatisfactory evidence, on account of the facility with which it may be fabricated, and the impossibility, generally, of contradicting it when false.*"

Fabricated and false—these words, as used by Chief Justice Currey, are the only terms in which this plaintiff's case and his charges of oppression can be adequately qualified. And for this, we are able to add the evidence in writing, furnished by Graham over his own signature. It was Graham who sought systematically to thwart and obstruct the realization of the final settlement. That settlement provided for the reorganization of the railroad company, and the retirement of Graham's directors, but it became necessary for the Spreckels Company to sue the railroad company, still in the hands of the Graham directorate, notwithstanding the settlement, in order to compel a registration in the name of the Spreckels Company or their nominees, of the railroad stock (p. 435). Graham was charged in that case with improper diversion of funds. The Farmers' Loan & Trust Company, shortly afterwards, began a suit for the foreclosure of the

bonds, and in that suit Graham intervened (p. 435). Graham admits that he personally sent to A. B. Spreckels from New York, a dismissal of his intervention in the latter case, and a consent to the entry of judgment in the former case, omitting the charge of diversion of funds (pp. 435-440). In the action for salary, in which we have referred to the verdict of an Oregon jury as, in effect, convicting Graham of perjury, he testified that at the time he sent on these dismissals, it was with the understanding that his claim for salary against the Coos Bay, etc. Railroad Company, "*which was the only thing that I claimed off of them at that time would not be jeopardized*" (p. 441). This was in 1905. On February 8th, 1905, Graham encloses the dismissals to A. B. Spreckels in a letter marked "Defendant's Exhibit A" (pp. 446-8, 594-5). This letter, written some six years after the final settlement, is as follows:

"Room 512, 52 Broadway, New York City.
Wed. February 8, 1905.

"Mr. A. B. Spreckels,
San Francisco, Cal.

Dear Sir:

The enclosed papers will explain themselves, and I trust you will receive them in the same spirit they are sent. It would only be adding *insult to injury* for me to enter into any elaborate discussion to point out to you that I am doing you a kindness and myself a great injustice, *I am not*. I am doing this of my own motion without the consent or knowledge of my lawyers, and with only two motives. One is *I am sorry for the annoyance and trouble I have caused you by getting you into Oregon and will make further reparation when I can by getting you out as near whole as I can*.

"And the other is that the litigation here with Harriman has been so long drawn out and the end is not yet in sight, that I am broke. While I have no apprehension as to the final result here, I have got to husband my resources, which are now limited to what I can earn to carry on the war with and pay expenses. And until this is ended and I have received something substantial from the results, I will have nothing to offer you to turn the property back to me for, provided of course you want to discontinue the control of it at that or any other time. The decisions we have had here and the last one which we have recently received is all that I could ask for, but it is now evident that I can only get the benefits when the Supreme Court has had its last say, as it seems to be their policy to end nothing until the last ditch has been crossed, with the hopes that I will fall down by the wayside for the lack of money to carry on the fight with, and I understand from them that Harriman is amply justified in this conclusion by what appears to him to be reliable information which he is receiving abundantly from Oregon. *If these papers meet with your approval as far as they go, and they are unsufficient to attain the object which I have in view, viz., to dismiss and settle the whole proceedings forever, I shall supply them upon hearing from you.*

"I am,

"Yours truly,

(Signed) R. A. GRAHAM.

"Since having those papers prepared, I have been laid up sick and that gave me time to think about that insurance policy on my life. *As it seems to be the only thing unadjusted between us,* what can you do in the matter in justice to yourselves? Yours R. A. G."

We conclude this statement of the case with the following excerpt from the opinion of Judge Bean:

"The evidence, in my judgment, does not show that the contract was made under circumstances which render its enforcement unconscionable. It was voluntarily entered into by the plaintiff after days of negotiation, with full knowledge of all the facts, under the advice

of able counsel, and there is nothing in the testimony, so far as I can see, to indicate that plaintiff was overreached or imposed upon in any way in the making of the contract. It may be, and perhaps is true, that he was in straitened financial circumstances, and believed that the contract promised the most feasible way for him to save something out of his Coos Bay ventures, but if so, it affords no legal reason why the contract should not be enforced as made. The bill will therefore be dismissed'' (pp. 176-7).

I.

THE AGREEMENT AND TRANSACTION OF JUNE 8th, 1899, WAS NOT ONE OF MORTGAGE OR CONTINUING SECURITY, BUT WAS, AND IT WAS MEANT AND UNDERSTOOD TO BE, A COMPLETE ADJUSTMENT OF ALL MATTERS OF DIFFERENCE.

It is inconceivable that the settlement of June 8th, 1899, could have been, or that anybody understood or believed it to be, a mere mortgage and continuing security. Its precise, considered, and careful purpose was to end anything like mortgage, or a continuing security. Its aim and intent, as conceived and expressed, was not to continue an existing and intolerable condition of things, but to abolish it. There had been mortgage enough and continuing security already. The creditor had brought his suit to foreclose—to foreclose on this railroad indebtedness, and on the Coos Bay stock, bonds, and land that underlay the indebtedness as security. The foreclosure suit had gone to trial; it had been on trial for some 28 or 30 days. The proposal for a settlement came from the debtor. It is not believable that the debtor, not to speak of

the creditor, was proposing to settle a mortgage liability and litigation by going on with the mortgage as before, with another foreclosure suit in sight, to begin all over again. The Spreckels Company had something else on its hands besides this railroad mortgage and foreclosure suit; it had all these troubles in the Beaver Hill Coal Mine; it wanted to put an end to the relation of debtor and creditor in the railroad, to the relations and litigation with Graham in respect to the Beaver Hill Coal Company, the receivership, the accounting, to the receivership litigation in the Coos Bay Railroad;—to all relations, finally and forever, with Graham. And nobody understood that better than Graham and his lawyers, and hence it was that the final settlement of June 8th, 1899, opens with these words:

“That the parties hereto, for the purpose of *completely adjusting all matters of difference* between themselves, and between *each* of them and the *Beaver Hill Coal Company*, a corporation, and the *Coos Bay, Roseburg and Eastern Railroad and Navigation Company*, a corporation, do hereby agree as follows.”

The payment of \$550,000. by Graham, under this settlement, was not a debt; he came under no obligation to pay this money—it was wholly optional with him, to pay it or not as he chose. The title to the property involved was put by both parties in the trustee; not simply the title to the stocks, bonds, and land, which Graham had hypothecated as security for the note in the foreclosure suit, but, as well, the title to the Beaver Hill Company's stock, which was, all of it, the property of the Spreckels Company. Graham

retained no future interest in the property which he had pledged, nor did he acquire any interest in this property of the Spreckels Company, except and only by a reservation to himself in the settlement, of an option to become vested with title from the trustee upon payment of \$550,000.00. He could not be compelled to pay that money, it was not a debt of his, the relation of debtor and creditor did not pertain to it,—it was a mere option which he was at full liberty to exercise or not as he pleased.

We print the settlement of June 8th, 1899, as an appendix to this brief. The first paragraph deals with the dismissal of the receivership suit, brought by Graham against the Beaver Hill Coal Company, and in which, it will be recalled, Hassett had been, in the first instance, and *ex parte*, appointed receiver, and afterwards superseded by Catlin, pursuant to the order of Judge Bellinger. Paragraph 2 provides for the dismissal, and *at once*, of the accounting suit which the Beaver Hill Coal Company had brought against Graham, charging him with various delinquencies and embezzlements, and for a release, also to be given presently, by the coal company to Graham, of all claims and demands. Paragraph 3 provides for the dismissal, and *at once*, of the receivership suit which the Spreckels Company had brought against the Coos Bay etc. Railroad Company. Paragraph 4 provides that a judgment shall be “at once entered” in the foreclosure suit, and that all proceedings to enforce the judgment shall be stayed for six months, being the whole life of the agreement, as to which time

was of the essence. But this satisfaction operated at once as an equitable and absolute discharge of liability; for it was deliverable to Graham at the end of the six months—during which period, as noted, the judgment was inoperative—and deliverable to him in any event or contingency, no matter what happened; for it was provided in subdivision e of paragraph nine, that in the event of payment by Graham of the \$550,000., the trustee should deliver to him the satisfaction of judgment, and it was provided in subdivision f of paragraph 10, that in the event of non-payment by Graham, the trustee, all the same, should deliver to him the satisfaction of judgment.

The true character of the agreement of June 8th, 1899, as extinguishing the status of debtor and creditor, and putting the title to the properties in question in the trustee, and reserving to Graham, not an imposed or continuing obligation, but a mere option and choice to acquire title from the trustee on payment of the \$550,000., comes out when we look at paragraph 6. It is therein provided that Graham shall deliver to the trustee “*all of the shares of the capital stock of said Coos Bay etc. Railroad Company in excess of the 10,001 shares thereof now held by the second party, certificates therefor to be properly indorsed, excepting 7 shares thereof to be issued to the directors of said company as hereinafter provided.*”

We pointed out, in the statement of the case, that the note on which foreclosure proceedings had been brought, was secured by \$10,001 shares of the Coos Bay stock, 620 bonds of this railroad company, and the

Marshfield land, as to which we shall have something to say. The remaining shares, exclusive of the few shares that went to qualify directors, were outstanding and unpledged, some 9,993 shares, held and owned by Graham, and in his name. The bonds were transferred to the trustee without further instrumentation; they were payable on their face to bearer. But these Graham shares, outstanding and unpledged, are required by the agreement to be properly endorsed, and, in fact, they were properly endorsed by Graham and delivered to the trustee. The only way in which Graham could re-acquire title to this unpledged stock—stock that was no part of the security for the note in foreclosure, free stock outstanding in Graham's name, was by the exercise of the option to pay the \$550,000. Meantime the title was in the trustee. This is put beyond cavil by paragraph 9 of the agreement, from which we quote:

“If, at any time within six months from the date of this agreement, the first party (Graham) shall pay or cause to be paid to the said trustee, for the use and benefit of the second party, the sum of \$550,000, in gold coin of the United States, the *title to all* of the shares of stock, bonds, real property and judgments below mentioned, *shall thereupon vest in*, and the same *shall become the absolute property* of the first party.”

Again, paragraph 6 provides as to the Spreckels Company, that it shall deliver to the trustee, “properly indorsed by the second party”, the certificate for so much of the Coos Bay stock as was not outstanding in Graham; namely, the 10,001 shares of that stock which Graham had pledged to the second party as security for the note in foreclosure. The Spreckels

Company held these shares simply as pledgee; Graham owned them. But they went to the trustee. Graham could re-acquire title to this pledged stock, as he could re-acquire title to the unpledged stock, not by paying a debt but by exercising an option; and in such event, as shown by paragraph 9, just quoted, "the title to all of the shares of stock" and other properties mentioned, "shall thereupon vest in, and the same shall become the absolute property of the first party".

Again, paragraph 6 provides for the delivery by the Spreckels Company to the trustee, of all the shares of the Beaver Hill coal stock, excepting one share each for the present directors of the company, but these directors' shares shall be endorsed and delivered to the trustee as soon as possible, and held by the trustee along with the other shares of said stock; and in paragraph 9, subdivision a, "all of the capital stock of said Beaver Hill Coal Company placed in the hands of said trustee, and all of the shares thereof issued to said directors of said company, *all* duly endorsed," is to be delivered to Graham, if he shall exercise his option, whereupon, as we have already quoted, the title thereto shall vest in him, and the same shall become his absolute property. Not a share of this stock belonged to Graham, as we pointed out in the statement of the case, referring to the Norman contract; not a share of that stock was pledged for the note under foreclosure; every share of that stock was owned and held by the Spreckels Company. Under the agreement, Graham was to

acquire the title thereto, if and when he should exercise the option.

Again, as to the Marshfield land, which had been mortgaged by Graham as part of the security for the note, it was provided that both parties should join in a deed to the trustee:

“The first and second parties shall jointly execute and deliver to said trustee a deed to the following described property situate in the town of Marshfield, in Coos County, Oregon, sufficient in form and substance *to vest the title thereto in said trustee;*”

a description of the land follows. Paragraph 9, to which we have made reference, provides that if Graham shall exercise the option, “the title to * * * the real property * * * below mentioned shall thereupon vest in, and the same shall become the absolute property of the first party,” and the trustee is authorized to deliver to him “a good and sufficient deed of conveyance executed by said trustee to the first party, of the above described real property in said town of Marshfield”.

The same provisions are made in respect to the 620 bonds, pledged for the note under foreclosure. We need not repeat them. It is thus apparent that there was no executory or continuing interest or title, in Graham, as to any of the property mortgaged under the note, as by way of equity of redemption. The equity of redemption, so called, is neither more nor less than a subsisting title, the title of the mortgagor subject to the right of the mortgagee to enforce his lien. Graham was reserving no title in himself what-

ever, but with clearly understood intent, he made a forthright and outright transfer of his title to the trustee, and reserved to himself the privilege and option of acquiring title from the trustee, if he chose to make payment of a stipulated consideration. The Spreckels Company, similarly, as appears from paragraph 6, had turned over to the trustee all of the capital stock of the Beaver Hill Company, and had also given up its pledge of the Coos Bay stock and of the Coos Bay bonds to the trustee, also assignments of certain judgments on subscription contracts, which it held in pledge from Graham; and had joined in the execution and delivery to the trustee of the Marshfield land; and it was only in the event of a failure by Graham to exercise his option, that the Spreckels Company should then acquire title to the securities and property in question, including the Beaver Hill stock which theretofore it had owned in its entirety. The language of paragraph 10 of the settlement agreement is as follows:

“Should the first party fail to pay or cause to be paid to the said trustee, for the use and benefit of the second party, within said six months from the date hereof, said sum of \$550,000., in gold coin of the United States, the *title* to *all* of the shares of stock, bonds, real property and judgments above mentioned *shall*, at the expiration of said six months, *vest in*, and the same shall become the *absolute property* of, the second party.”

The property is then specifically enumerated, the endorsed stock is to be delivered, likewise the bonds, assignments are to be made of the judgments, and, in the case of the Marshfield land, a good and sufficient

deed of conveyance is to be executed by the trustee to the second party.

All securities, therefore, were relinquished, all pledges were given up, all title to the properties was transferred to the trustee. Graham reserved an option of purchase at a stipulated consideration, and it was only in the event of his failure to exercise the option, that the Spreckels Company was then to get title and possession of the properties involved, including the pledges, and including as well property owned and unpledged by Graham, and property which had been theretofore owned in its entirety by the Spreckels Company. The debt was gone; the relation of debtor and creditor was extinguished; there was no way in which Graham was obligated or compelled to pay the debt; the Spreckels Company had no obligation against him or compulsion upon him to the extent of a dollar.

More than that, the change of relation between the parties, as to all matters, not as to one or some, is made apparent from the scheme of releases provided by the settlement of June 8th, 1899. It was provided, not as an executory or continuing matter, but as one of the considerations, a present one, for the contract, that Graham's suit against the Beaver Hill Coal Company in Oregon should be *at once* dismissed upon the settlement of Mr. Catlin's account as receiver. It was provided, as one of the considerations of the contract, that the suit by the Beaver Hill Coal Company against Graham for an accounting, should be *at once* dismissed. It was provided as one of the considerations of the contract, that a release from

the Beaver Hill Coal Company to Graham should be executed and delivered to him *upon the signing* of the settlement contract, and it was provided, as one of the considerations of the contract, that the receivership suit by the Spreckels Company against the Coos Bay Railroad should be *at once* dismissed. It was also provided that the Coos Bay Company should execute a release to Graham. This was not provided to be executed at once, and for this obvious reason. The agreement contemplated that the Graham directors, pending the option, should be superseded by a new board, in which the Spreckels Company should have a majority, that this reorganized board should execute the release, and it was expressed in terms that the release should be executed as soon as possible—as soon as the reorganization could be effected.

And upon the 8th day of June, 1899, at the time of the settlement, Graham executes four releases to the Spreckels Company (pp. 532-533, 656-671) over and above the settlement agreement itself, and “with the purpose of carrying out the agreement with the parties entered into” (p. 534). Graham’s receipt in writing for the satisfaction of judgment, delivered to him as provided in the settlement, was proved by the testimony of Mr. Moulton, of the Bank of California (pp. 645, 650, 654), and of Mr. Daniels, of the Bank of California (p. 640); and was, in effect, admitted by Graham himself, under oath, in the salary case, in which the verdict of an Oregon jury has already been referred to (p. 433). It was in this same case, that Graham filed a verified answer, August 6th, 1900,

admitting the ownership of the Spreckels Company in all the shares of the Coos Bay stock, and that answer, in the salary case, he testified was correct as he understood it at that time—August, 1900 (pp. 432-3).

Such is the settlement of June 8th, 1899—in its purpose and intent, in its express language, in all the circumstances surrounding it and giving it character. If sane men, with the aid of capable lawyers, and with the definite object of adjusting all differences, cannot make and rely upon a contract of the kind here, and if a repudiator can come into court twenty years after and insist successfully upon the repudiation, could any worse reproach to the administration of the law be conceived?

When this question was before Judge Bean on demurrer, he handed down this answer and opinion:

“The contract of June 8th, 1899, therein set out, contains diverse and sundry provisions, and I shall not assume to state its contents in detail. In my judgment it was, as stated therein, ‘for the purpose of completely adjusting all differences’ between the contracting parties, and did not constitute a continuing security for the payment of a debt due the defendant Spreckels & Bros. Company from the plaintiff. The bonds and a large part of the stock now in controversy had theretofore been pledged by the plaintiff to Spreckels & Bros. Company as security for moneys advanced by them to the plaintiff to enable him to proceed with the construction of the railroad. At the time of the execution of the contract of June 8th, 1899, a suit to enforce a lien against the pledged property was pending and on trial in the courts of California. Other suits and actions were pending between the parties in the courts of Oregon and California and diverse claims were made by one against the other. The manifest purpose of the agreement was

to settle these disputes and all litigation then pending. By its terms and in pursuance thereof, the stock and bonds now in controversy were assigned and transferred by the plaintiff and Spreckels & Bros. Company to the Bank of California as trustee, to be by it delivered to the plaintiff in case he should pay to the bank for the use and benefit of Spreckels & Bros. Company, \$550,000. within six months from the date of such agreement, time being made the essence of the contract, and if he failed to make such payment the bank was to transfer and deliver the stock and bonds to Spreckels & Bros. Company. The plaintiff failed to make the payment as stipulated and the stock and bonds were thereupon assigned and transferred by the Bank to Spreckels & Bros. Company and they thus obtained an absolute title thereto. I do not think the parties intended to continue the relation of debtor and creditor or that the property should thereafter be considered in any way as a continuing security for the payment of a debt due from plaintiff to Spreckels & Bros. Company. No such intention is to be found in the terms of the agreement or the circumstances surrounding it. Its whole scope and tenor precludes the theory that another mortgage or pledge was intended. The object of the suit then pending in the California court was to put an end to that relation by foreclosure and sale of the pledged property. The agreement of settlement was designed to effect that purpose by the action of the parties without the aid of the court. It was intended to dissolve the relation of debtor and creditor, and not to create or continue an equity of redemption in the plaintiff. For that purpose and to that end the parties were to and did transfer to the bank as trustee all their interests in the property now in controversy. The bank therefore became, in a sense, the agent and representative of both parties to hold the property and deliver it to the plaintiff if he complied with the terms of the agreement and made the payment within the time specified and if not, to deliver it to Spreckels & Bros. Company. The plaintiff was given an option to so acquire the property by the payment of a stipulated sum within a definite time.

There was no obligation, however, upon his part to make such payment nor could he have been compelled to do so. It was a mere right or privilege which he could exercise or not, according to his own judgment. Time was made the essence of the contract and it was expressly stipulated that in case of the failure of the plaintiff to make the payment within the time specified the title to the property 'shall vest in and the same shall become the absolute property' of Spreckels & Bros. Company'' pp. 10-12).

We add the following, taken from Judge Bean's opinion which he handed down after trial, on final submission:

"In my judgment, the contract in suit was not a mortgage or pledge, nor an agreement to cut off or bar an equity of redemption, but, as stated on its face, was for the purpose of completely adjusting all differences between the parties, not only growing out of the suit then pending in California, but other suits and actions in the courts of California and Oregon, and divers claims and demands made by one against the other and the corporations in which they were mutually interested. The reasons for this conclusion are stated in memorandum heretofore filed, overruling the demurrer to the answer, and need not be elaborated'' (pp. 175-6).

Judge Bean says, also at the same place:

"A careful consideration of this case, in the light of the testimony, the argument of counsel, and authorities cited by them, confirms the view heretofore expressed that the contract of June 8, 1899, between plaintiff and defendant Spreckels & Bros. Company, was not a mortgage or pledge or continuing security for the payment of a debt, but was designed to, and did, put an end to the relation of debtor and creditor between them."

II.

EVEN IF IT BE ASSUMED THAT THERE WAS A RELATION OF DEBTOR AND CREDITOR, NOTWITHSTANDING THE PLAIN TERMS OF THE AGREEMENT OF JUNE 8th, 1899, WITH AN EQUITY OF REDEMPTION, IT WAS COMPETENT TO THE PARTIES BY THAT SUBSEQUENT CONTRACT, TO PROVIDE FOR THE EXTINGUISHMENT OF THE EQUITY OF REDEMPTION, PROVIDED THE CONTRACT ITSELF WAS FAIR AND NOT OPPRESSIVE.

The agreement of June 8th, 1899, was made by and between California lawyers, representing the parties, with the law of California in their minds, and it was to be performed in California. In *Coghlan v. South Carolina Railroad Co.*, 142 U. S., pp. 109-110, it was said by the Supreme Court of the United States:

“This court, speaking by Mr. Justice Matthews, held upon full consideration, in *Pritchard v. Norton*, 106 U. S. 124, 136, that the law upon which the nature, interpretation and validity of a contract depended, was that which the parties, either expressly or presumptively, incorporated into it as constituting its obligation. This doctrine was reaffirmed in *Liverpool &c. Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 458, where it was said that, according to the great preponderance, if not the uniform concurrence of authority, the general rule was, ‘that the nature, the obligation and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view.’ The elaborate and careful review of the adjudged cases, American and English, in the two cases last cited, leaves nothing to be said upon the general subject.”

Turning, now, to the law of California for “the nature, the obligation and the interpretation of the contract” we cite the decision of the Supreme Court

of California in *Watson v. Edwards*, 105 Cal. pp. 75-6.
The court said:

“A mortgagor may sell and convey all his right and interest in the mortgaged premises to the mortgagee, where the transaction is fair, honest, and without fraud, and where no unconscionable advantage has been taken of his position by the mortgagee. It would be surprising if two men in their senses and with their eyes open, could not make such a contract. The doctrine, ‘once a mortgage always a mortgage’, does not refer to *future* contracts. In Washburn on Real Property, it is said that the character of a mortgage cannot be changed ‘by an agreement of the parties made *at the time* of the execution of the deed’, and that ‘equity will not admit of a mortgagor embarrassing or defeating his right to redeem the estate by any agreement which he may be induced to enter into *in order to effect a loan*;’ but that ‘this does not preclude any *subsequent bona fide* agreement in respect to the estate between the parties’, and that ‘the mortgagee may always purchase the mortgagor’s right of redemption, and thus acquire an absolute title’. (2 Washburn on Real Property, 5th Ed., top pp. 65, 66, secs. 23, 24.) Section 2889 of the Civil Code does not change the rule. The case at bar is in principle exactly like the case of *Green v. Butler*, 26 Cal. 595. In that case, Justice Sawyer, speaking for the court, after noticing a number of authorities to the point, says: ‘Independent of authority, no argument is necessary to show that, upon principle, a mortgagor has the same capacity to contract with reference to his interest in the mortgaged premises that he has with reference to any other property’. The only difference between that case and the one at bar is, that in the former case there was some consideration between the parties in addition to the mortgage debt; but the kind or character of the consideration can make no difference if it be, as in the case at bar, fair and adequate. There was no advantage taken of the mortgagor by the mortgagee; the latter was the reluctant party, and the transaction was pressed on him by the mortgagor.”

This language reads as if it had been written for the pending case.

In *McDonald v. Huff*, 77 Cal., 280, it appeared that in 1882 John Huff was indebted to John E. McDonald, who held a mortgage upon the land in controversy, and also a judgment against Huff. It was agreed between them that Huff should convey the mortgaged land to John E. McDonald, in consideration of a release of all the indebtedness, but that the conveyance of the land should be held in escrow by R. H. McDonald till November 21st, 1882; and in case Huff paid to John E. McDonald the sum of \$3080. before that date, the conveyance should be returned to Huff, but if he failed to make this payment before that date, the conveyance in escrow should be delivered to John E. McDonald, and become absolute.

November 21st, 1882, came and went, but Huff did not make the payment to John E. McDonald, and so it continued until March 16th, 1883, when R. H. McDonald delivered the deed to John E. McDonald.

Some three months after November 21st, 1882, namely, on February 13th, and February 28th, 1883, Huff made two separate and unsuccessful demands for the delivery back of the deed; but he had not made the payment; so he did not get the deed. On February 26th, 1883, Huff, notwithstanding what had happened between him and John E. McDonald, proceeded to make a second deed of the land, this time to the defendant Herrick, who had notice of all the facts.

The question was, who should prevail in title to the land, John E. McDonald under the earlier deed, or

Herrick under the later. Huff and Herrick, through their counsel, argued that "the transaction, if concluded, can only be regarded as a mortgage, and the restriction of the right of redemption is void".

What did counsel for John E. McDonald argue? Judge Garber is one of the dead men, into whose mouth Graham has put parol declarations. He makes the statement in respect to Judge Garber—as he made the statement in respect to Mr. Frohman, still living, proved to be false by Frohman himself—that Judge Garber told him the settlement of June 8th, 1899, was a mortgage. By a peculiar historical coincidence, in this case of *McDonald v. Huff*, which was decided, October 24th, 1888, 11 years before the settlement between Graham and Spreckels was made, Judge Garber was counsel for John E. McDonald, and he argued, and successfully, that

"the mortgagee may purchase the equity of redemption by a *bona fide* sale, and the fact that he gives a privilege of repurchase—that the contract is more advantageous to the debtor—cannot render the transaction less valid".

The Supreme Court of California said:

"The deed from the appellant Huff to respondent was, in the hands of R. H. McDonald, an escrow. And being so, it could not be revoked by the appellant. The depository was not the agent of the vendor alone, but of both parties, and, as such, was bound to deliver the instrument on performance of the condition provided for in the contract under which he held it. Here were two written instruments, signed by the appellant Huff, one an agreement to convey on certain conditions, which was fully executed by delivery to the depository; the other a deed, made in pursuance of the agreement, and to become operative upon the happening of the conditions set forth

in said agreement, and its delivery by the depositary to the respondent. The first of these was binding upon the appellant, from its delivery to the depositary, without the signature of respondent, or any contract in writing from him. And the respondent, having agreed verbally to the terms of such written agreement to convey, was thereby estopped to enforce the collection of his debt until the time fixed for the payment of the money in pursuance thereof, or, in default of such payment, the delivery of the deed.

“The findings of the court below show an acceptance of the deed by the attorney of the respondent, and that he by his agent and attorney, duly executed a receipt in full of all demands against the defendant Huff, and deposited the same with the depositary for his use. This shows a sufficient delivery and acceptance of the deed and release of the indebtedness.”

It was accordingly held that “the title to the property in controversy vested in the respondent by the delivery of the deed to him” effective as of the date of the contract authorizing its delivery, and that Herrick, who took his deed with knowledge of the facts, obtained no title.

Bradbury v. Davenport, 120 Cal. 152, was decided by the Supreme Court of California, opinion by Mr. Justice Van Fleet, on February 23rd, 1898, little more than a year before the settlement of June 8th, 1899. The contract in this case recited that one Keniston—of whose estate, the plaintiff Bradbury was administrator, was the owner of certain land which was under mortgage to Davenport as security for a note which Keniston had made. There was due on this note \$3333.87 on March 1st, 1895, and at that time Keniston and Davenport made the contract. Under this contract

Keniston deeded the mortgage premises to Davenport, but placed the deed in escrow in the hands of the cashier of a bank, and Davenport placed the note and mortgage in the same custody.

“Said escrow was made for the purpose, and upon the condition mutually agreed, that if Keniston should pay to said cashier for the benefit of Davenport, on or before July 1st, 1895, the amount of said note, with semi-annual interest thereon at the rate of $10\frac{1}{2}$ per cent per annum from the first day of March, 1895, to the time of such payment, said cashier should surrender the note and deed to Keniston, and satisfy the mortgage. But if Keniston should fail to pay the indebtedness as stipulated, then the custodian should deliver the deed to Davenport, and the note to Keniston; the stipulation being that, in that event, such delivery of said deed to Davenport shall be a full payment and satisfaction of said note.”

It is true that the contract provided that notwithstanding the passing of the deed to Davenport, Keniston should have the right to remain in possession of the premises thereafter, until November 1st, 1895, but as the tenant of Davenport.

It was argued for Bradbury, as Keniston's administrator,

“that the contract was void because it was in effect an agreement for the forfeiture of the mortgaged premises in the event of the failure to pay by July 1st, and was in restraint of the right of redemption,—in contravention of section 2889 of the Civil Code; and that the contract being void, the deed found to have been delivered in pursuance thereof, is tainted with the same vice”.

The opinion of the Supreme Court of California, rejecting this contention, says:

“But, under the facts found, we are unable to perceive wherein the transaction is to be distinguished in any material respect from that sustained in *Watson v. Edwards*, 105 Cal., 70, 75, and in *McDonald v. Huff*, 77 Cal. 279; nor, in fact, why the question is not in effect concluded by what is said on the same subject on the former appeal. (*Bradbury v. Davenport*, 114 Cal. 593.)”

Referring to its own decisions, the Supreme Court continues:

“In *Watson v. Edwards*, *supra*, it was held that Section 2889 of the Civil Code does not affect or refer to a subsequent contract between the mortgagor and mortgagee in respect to the title to the mortgaged premises; and it is said: ‘A mortgagor may sell and convey all his right and interest in the mortgaged premises to the mortgagee, where the transaction is fair, honest, and without fraud, and where no unconscionable advantage has been taken of his position by the mortgagee. It would be surprising if two men in their senses, and with their eyes open, could not make such a contract. The doctrine, once a mortgage always a mortgage, does not refer to future contracts. In Washburn on Real Property it is said that the character of a mortgage cannot be changed by an agreement of the parties made at the time of the execution of the deed, and that equity will not admit of a mortgagor embarrassing or defeating his right to redeem the estate by any agreement which he may be induced to enter into in order to effect a loan, but that this does not preclude any subsequent bona fide agreement in respect to the estate between the parties, and that the mortgagee may always purchase the mortgagor’s right of redemption and thus acquire an absolute title.’ (2 Washburn on Real Property, 5th ed., pp. 65, 66, secs. 23, 24.)

“And in *McDonald v. Huff*, *supra*, it is held that such a transaction is complete and operative and irrevocable from the delivery of the contract and deed to the

depository, and is effectual to vest the legal title in the grantee upon the conditions of the contract being fulfilled."

The court now takes up its decision on the former appeal in this same case:

"The correctness of these principles is fully recognized," says the court, "in the opinion filed on the former appeal. That was an appeal from a judgment entered on demurrer—sustained to the complaint on the ground that it did not state a cause of action. The judgment was reversed, not because of a failure of the court to endorse the doctrine of the cases above cited, but because it was conceived that, by reason of certain averments in the complaint, the transaction was shorn of the elements of *fairness and good conscience* requisite to bring it within the rule of those cases. The complaint in this respect alleged, in effect, that the making of the contract and deed was *unfairly induced* by the representations of the mortgagee, while the mortgagor was sick and unfit to attend to business and in embarrassed circumstances; and was procured to be made *without just or adequate consideration*, in that the equity of redemption was of the value of \$4000. over and above the indebtedness for which the conveyance was executed. And it was held, that the complaint stated a cause of action—that such a conveyance or release must be for a consideration which *would be deemed reasonable* if the contract were between other parties, and that any *marked inadequacy of consideration* would vitiate the transaction; and that the burden was upon the creditor to show that *the right of redemption was surrendered deliberately and for an adequate consideration.*"

Mr. Justice Van Fleet now points out that the case, after trial, and upon the findings of the court, has quite another face from that presented by the complaint. The findings show that the contract was made by Keniston fairly and deliberately, while fully competent,

and without any representations or imposition on the part of Davenport, and for an adequate consideration.

"The supposed inequitable features presenting themselves for discussion in the former opinion," the court concludes, "are thus swept away and eliminated from the case, and what is there said on that subject is consequently wholly inapplicable to the case disclosed by the findings. This leaves the case as suggested above, squarely within the doctrine of *Watson v. Edwards*, *supra*, and the other cases cited."

In *Garwood v. Wheaton*, 128 Cal. 400, 404, the Supreme Court said:

"A mortgagor may sell and convey all his right and interest in the mortgaged premises to the mortgagee, where the transaction is fair, honest, and without fraud, and where no unconscionable advantage has been taken of his position by the mortgagee. It would be surprising if two men in their senses and with their eyes open, could not make such a contract. The doctrine, 'once a mortgage, always a mortgage,' does not refer to future contracts."

The doctrine of the Supreme Court of California is also the settled doctrine of the Supreme Court of the United States.

"A subsequent release of the equity of redemption," says the Supreme Court of the United States, (*Peugh v. Davis*, 96 U. S. 332, 337), "may undoubtedly be made to the mortgagee. There is nothing in the policy of the law which forbids the transfer to him of the debtor's interest. The transaction will, however, be closely scrutinized, so as to prevent any oppression of the debtor."

And at the Circuit, in the case of *DeMartin v. Phelan*, 47 Fed., p. 763, it is said instructively by Judge Hawley, late a member of this Court of Appeals:

“What is the relation of mortgagor and mortgagee? Under the law of California and most of the other states, the mortgagee takes no estate in the land, but has only a lien thereon as security for the debt until foreclosure. He can, at any time, make a *bona fide* purchase of the equity of redemption or interest of the mortgagor, and thereby acquire an absolute title to the mortgaged premises. There is no trust relation between the mortgagor and the mortgagee when unaccompanied by possession. The mortgagee does not owe the mortgagor any duty to protect the equity of redemption. There is no relation analogous to that of trustee and *cestui que trust* between the mortgagor and mortgagee created by the execution of the mortgage. No fiduciary character exists between them which prevents the mortgagor from buying the property at foreclosure sale, and holding the title thus acquired adversely to the mortgagor. The mortgagee can at all times deal with the mortgagor in respect to the property mortgaged precisely upon the same footing as any other person, and may purchase liens or claims against the property for less than their face value, and hold them against the mortgagor for the full amount. Under these general principles, which are well settled and supported by numerous authorities.—*Green v. Butler*, 26 Cal. 601; *Ten Eyck v. Craig*, 62 N. Y. 421; *Walker v. Bank*, (Del. Err. & App.) 14 Atl. Rep. 823; 6 Lawson, Rights, Rem. & Pr. Sec. 3031,—how can it consistently be claimed that the averments of the bill in this case are sufficient to maintain this action? Parties who are in poor and destitute circumstances, if they have any property, and wish to dispose of it, are often compelled by their necessities to sell their property for less than its real value; but if they obtain all that they ask for it, or voluntarily accept what is offered, and there is no fraud, deceit, oppression, improper or undue influence, or confidential relations existing between them, courts of equity have no jurisdiction, power or authority to set aside such transactions.”

Judge Hawley goes on to say, further:

“There is, in most cases, a contest between the purchaser and the seller of real property; the purchaser

usually endeavoring to buy the property at the lowest price the owner is willing to take, and the owner trying to get the highest price the purchaser is willing to pay. In a certain sense, the purchaser, with ready money at his command, takes advantage of the circumstances of the owner who is poor, and by reason of his poverty is willing to sell for whatever is offered. When the parties are dealing at arm's length in the open market, and no unfair or improper measures are used, or misrepresentations made, it would be absurd to say that a court of equity, years afterwards, when the party selling had met with financial success and acquired sufficient means to repay the purchase money, could be called upon to annul the sale.

"It is only in cases where the *bona fides* of the transaction is called in question," continues Judge Hawley, "and when fraud or other like causes above enumerated are alleged, that courts of equity are authorized to interfere. In such cases, the relation of mortgagor and mortgagee is 'always a circumstance which creates suspicion, and aids in the proof of an allegation of oppression and undue advantage, where there is a gross inadequacy of price, and other circumstances tending to show fraud'. *Chapman v. Mull*, 7 Ired. Eq. 294. The authorities cited and relied upon by complainant are cases of this character. Thus, in *Peugh v. Davis*, where the action was to set aside a release of the equity of redemption, it being alleged and claimed that the money paid for the release was in fact a further loan of money, and that the release was given only as security for such loan, and the question to be determined was, as to the true character of the transaction, the court very properly said that the transaction, will be 'closely scrutinized, so as to prevent any oppression of the debtor; that a release to the mortgagee will not be inferred from equivocal circumstances and loose expressions; the release must also be for an adequate consideration; that is to say, it must be for a consideration which would be deemed reasonable if the transaction were between other parties, dealing in similar property in its vicinity—any marked under valuation of the property in the

price paid will vitiate the proceeding.' 96 U. S. 337. The same rule was applied in *Villa v. Rodriguez*, 12 Wall. 323, to enable the court to determine whether a deed absolute upon its face was a mortgage. In *Russell v. Southard*, 12 How. 154, the same doctrine is announced and applied to a mortgagee in possession of the property, where the question of the purchase of the equity of redemption was in dispute. The court, in the course of the opinion, indicating the necessity of confining the rule to the proper class of cases, said:

" 'But strong expressions, used with reference to the particular facts under consideration, however often repeated by subsequent writers, cannot safely be taken as fixing an abstract rule. We think that, inasmuch as the mortgagee in possession may exercise an undue influence over the mortgagor, especially if the latter be in needy circumstances, the purchase by the former of the equity of redemption is to be carefully scrutinized when a fraud is charged; and that only constructive fraud or an unconscientious advantage which ought not to be retained, need be shown, to avoid such a purchase. But we are unwilling to lay down a rule which would be likely to prevent any prudent mortgagee in possession, however fair his intentions may be, from purchasing the property, by making the validity of the purchase depend on his ability afterwards to show that he paid for the property all that anyone would be willing to give. We do not deem it for the benefit of mortgagors that such a rule should exist.'

"The general principles," Judge Hawley concludes, "announced in these and other cases cited by complainant, when applied to a similar state of facts, should always be followed; but they have no application to the particular facts of this case, and cannot be considered as authority in support of the theory upon which complainant relies to sustain this action. To determine the character of the transaction, it would be unfair to confine the consideration solely to the alleged valuation of complainant's interest and the amount paid by defendant therefor. To be just to both parties, the entire transaction should be inquired into. Is it

reasonable to believe that any other person, with knowledge of the amount of the mortgage liens, in the light of the foreclosure proceedings, the accumulated costs and interest on the money, and the limited time allowed for redemption, would have paid more than \$19,000. for complainant's interests in the property? The fact that \$204,000. was paid for property alleged to be worth \$230,500., under such circumstances, certainly does not show such a marked undervaluation or inadequacy of price as would, of itself, shock the conscience, or raise any presumption of fraud or undue advantage that would justify a court of equity to annul the sale."

In *Lewis v. Wells*, from the District Court of Alaska, 85 Fed. 896, 899, cited by appellant, the same doctrine is recognized.

"The right of a mortgagor," says the District Judge, "to sell the mortgaged property to the mortgagee, and give him a perfect title thereto, cannot be denied but courts of equity have always looked with suspicion upon such conveyances, and especially is this true where usury is shown to have entered into the contract, and where the consideration for the deed is wholly inadequate to the value of the property."

And in *Collins v. Denny Clay Co.*, 82 Pac. 1012, 1014, opinion by Judge Rudkin, another case cited by appellant, the rule laid down in the cases from California, and in the Supreme Court of the United States, and so fully explained in the opinion by Judge Hawley, is again recognized. Judge Rudkin says:

"All the authorities agree that a mortgagor cannot, through any device, bargain away his right of redemption *at the time* of giving the mortgage. *Bradbury v. Davenport*, 114 Cal. 593; *Plummer v. Ilse* (just decided by this court), 82 Pac. 1009. While a mortgagor may release his equity of redemption to the mortgagee *by a subsequent* agreement, yet the courts view such agreements

with distrust and disfavor, and, if it appear that the mortgagee has taken advantage of the necessities of the mortgagor, or that the consideration is grossly inadequate, the release will be disregarded and the original relation held to continue."

So, also, in *Ritchie v. McMullen*, another case cited by appellant, 79 Fed. 522, 557-8, it was said by Judge Taft:

"A court of equity scrutinizes with great care the contracts made between pledgee and pledgor, as to the transfer of title to the pledgee, and does not hesitate to set aside such a contract *if* there is any ground for thinking that it is a harsh contract and one brought about by the position of vantage that the pledgee occupies with reference to the pledgor."

And so, with the other cases cited by appellant. The upshot is the same; fairly and correctly read and examined, they do not, in any sense, run counter to the settled doctrine of the California and Federal cases. A drowning man clutches at a straw. This appellant has found one case, a Kansas case, to which he makes lengthy reference. If that case can be said to sustain this appellant's contention, it is a *rara avis* indeed. It is the case of *Holden Livestock Company v. Trading Company*, 123 Pac. 734. We will look at it.

The livestock company, in June, 1901, had made a \$90,000. mortgage to the Mutual Benefit Life Insurance Company, on some Kansas land. This was the first mortgage. In July following, the company—which was really owned by Howard M. Holden—made a second mortgage to Holden for \$82,000. on the same land. Holden put up this second mortgage and the note

secured by it, as security with the National Bank of Kansas City, for his note to the bank of \$80,000. Holden had bought some land in Missouri, borrowing some of the purchase money from this bank, and securing the bank therefor by a deed of the land, made in the name of W. H. Winants; and it was agreed that Winants should hold this deed as additional security for Holden's \$80,000. note to the bank.

We now come to the year 1904. Just as Holden used the livestock company as his convenient, corporate agency,—owning it all—so the bank had a corporate agency, called the Interstate Trading Company; and in May, 1904, Holden made deeds, and had his company make them, of these two tracts of land to the Interstate Trading Company—not all of the Kansas land, however, for some of it had been sold meantime, and the proceeds had been paid in on account of what Holden owed.

We next come to 1908. In February, Holden and his company sued the bank and its Trading Company, to quiet title to the Kansas and Missouri land, and set up that these deeds had been given by way of security to the bank; asking, by way of relief, that if the court should find that the bank had been paid off, then the Holden title to the lands should be quieted; and if it should be found that there was something still owing the bank, that a decree should be made declaring that the title was held as security for such balance. The bank and the Trading Company, on their part, claimed that the deeds were absolute conveyances. That was the controversy.

It was found, as a fact, that the deeds did not stand alone; that they were made in connection with two written contracts, one of May 12th, 1904, and the other, two days later, May 14th. The contract of May 12th recited that Holden had caused to be conveyed to the Trading Company the absolute title to these lands, and had transferred to it some stocks, bonds, and notes, which had been held as collateral security for the same indebtedness; and that in consideration thereof, the Trading Company had paid Holden's note to the bank for \$77,873.90, and the further sum of \$6,253.30, advanced by the bank to pay taxes and interest on this \$90,000. mortgage, the first mortgage in the case, which had been made to the life insurance company, and which the bank subsequently bought in. The contract of May 12th also provided that Holden, until the following November, "was to have the right to sell the property as the agent of the Trading Company for not less than the sum of the amounts named, with interest; he to retain as commission anything in excess of that sum". The Holden Company, at the same time—May 12th, that is—delivered a deed of the Kansas land to the Trading Company, and Holden himself authorized Winants to make a deed of the Missouri land to the Trading Company.

The Kansas court held that this contract contemplated an actual sale, with nothing in Holden but a right to re-purchase, within a fixed time, for a stated price; and in so holding that court used this language:

"A mortgagor may, of course, sell the mortgaged property to the mortgagee, although the transaction will be

scrutinized closely to determine its fairness—being almost as much open to suspicion, it is said, as a purchase by a trustee from his beneficiary.”

The language of Judge Hawley in the case from 47 Fed. will be profitably recalled at this point. The Kansas court goes on:

“It is also said that a conveyance of the mortgaged premises from the mortgagor to the mortgagee will be regarded as a mere change in the form of security unless it clearly and unequivocally appears that both parties intended otherwise. It may be assumed that this contract on its face contemplated an actual sale, leaving Holden with nothing but a right to re-purchase, within a fixed time, for a stated price.”

But the Kansas court holds that it is the second contract, the one of May 14th, not the contract of May 12th, by which the case must be resolved.

“So far as there is any inconsistency between the two,” it observes, “this contract (of May 12th) must yield to that of May 14th.”

We are now told what the May 14th contract was,—as follows:

“The second contract recited that the bank had deposited with James A. Patton, an agent of the bank, Holden’s note to the bank for \$77,873.90, with some collateral security, and a demand note for \$6,253.30, which Holden had given the bank May 12th—being for the taxes and interest on the first mortgage; that the Trading Company had deposited with Patton its note to the bank for \$83,675.32, due November 9th, 1904; (the last day for Holden to re-purchase under the May 12th contract, we here interject); that Holden had deposited with Patton a bill of sale, transferring to the Trading Company the bonds, stocks and notes securing Holden’s note; and deeds to the Trading Company for the Kansas land,

executed by the Holden Company, and for the Missouri land, executed by Winants.

"The provision was made," continues the court, "that *if Holden's notes were paid* by July 9th, 1904, Patton should deliver up to Holden the notes, the collateral, and the deeds; if the notes were not paid by that date, Patton should deliver the bill of sale and the deeds to the Trading Company, deliver the Trading Company's note to the bank, and surrender Holden's note to Holden. This contract *was extended several times*, the last extension expiring October 11th, 1904; but finally, delivery was made, as directed in the event the notes were not paid by the date fixed."

The Kansas court held, in substance, that this second contract amounted to a recognition of the continuing relation of debtor and creditor between the parties. We give the language of the court:

"What it in substance amounts to is this: Holden, the mortgagor, and the bank, the mortgagee, agree that Holden is to have until July 9th, *to pay his debt.*"

And again:

"If the parties, by the plan outlined in the first contract, intended to carry out an arrangement the legal effect of which would be to pass the title to the land, leaving Holden only a right for its repurchase, they are shown by the second contract not to have consummated their purpose, but to have *voluntarily abandoned* that course, and adopted one of a *radically different nature*, which made the deed—which had been signed and acknowledged but not finally delivered—in effect a mortgage. The second contract distinctly recognizes *the notes as subsisting obligations* of Holden, and the loss of his title to the land is made to turn upon whether or not they are paid by a certain date."

The court admits it to be

"a familiar and undisputed proposition, that no force will be given to a stipulation *in* a mortgage, or *in*

a deed intended as a mortgage, by which the mortgagor agreed that if he fails to make payment by a stated time, the mortgagee shall become the absolute owner of the property; it is equally well settled that no effect will be given to such an agreement made separately from the mortgage, *but at the same time.*"

And again:

"This principle renders ineffectual the deposit of a deed in escrow by the mortgagor *at the time* he gives the mortgage, for delivery to the mortgagee if he fails to meet his obligation promptly; otherwise the rule could be readily evaded."

The court further admits,

"that *after* the execution of a mortgage, the mortgagor may release to the mortgagee his equity of redemption,—using the term to denote his right to redeem after his default, or more properly, his actual title to the property, not referring to the statutory right to redeem after a sale on foreclosure;—"citing for this well understood doctrine, 11 *A. & E. Encycl. of L.*, 243; 55 *Am. St.* 105; 3 *Pom. Eq.*, Sec. 1193; 2 *Jones on Mortgages*, Sec. 1045.

But, now, we are brought to an asserted distinction:
It is admitted

"that the mortgagor may, *at any time after* the execution of the mortgage, sell to the mortgagee outright, all his interest in the property, and by a conveyance operating at once, and in that sense, release his right to redeem. But he cannot, even after the mortgage has been made, bind himself by an agreement that, *if he does not pay his debt by a certain time in the future, he will forfeit all right to the property.* The recognition of such a right in a few cases, of which *Bradbury v. Davenport*, 120 *Cal.* 152, is an example, seems to result from a failure to note the distinction referred to. Considerations of public policy forbid the enforcement of a contract, made by the borrower *at the inception* of his loan, that he will forfeit his interest in the property he offers as

security, if he fails to meet his obligation promptly. The same considerations apply with equal force where he makes *a like contract upon a renewal of the loan, or an extension of the time of its payment.* To hold otherwise would be to deprive of the benefits of the rule, those most in need of its protection. If, *at any time after* the execution of the mortgage, the mortgagee could, by an extension of time, *or upon any other new consideration* obtain from the mortgagor a valid agreement that if he did not pay the debt in full by a certain date he should forfeit the entire security, then virtually the ancient common law mortgage would be still in vogue, its rigors unrelieved by any equity of redemption." (The italics are ours.)

The court now sees the Holden case for what it is. If that case, in the language just quoted from it, can be said to mean that while a mortgagee may acquire the equity of redemption by a contract made in good faith and without oppression, nevertheless the fact that, instead of taking the property outright and irrevocably, he reserves, for some stipulated time, a privilege to the mortgagor of re-acquiring the property, makes a valid contract invalid—then, it is to be said without offense intended, that such a decision should be relegated to the apocrypha. It is not sustained by an authority, state or federal, or by a respectable text writer. It is a Macedonian cry, a far cry, and a false one. We cannot think that a provision in a contract—a future contract—for the purchase of an equity of redemption, giving the mortgagee a reasonable time in which to re-acquire the property—a thing, as Judge Garber very properly argued in *Huff v. McDonald*, *supra*, more advantageous to the debtor—can have the effect of invalidating a transaction which would have been valid if the debtor had been denied the privilege.

In the case of *Phipps v. Munson*, 50 Conn. 268, suit had been brought for a foreclosure.

“The parties came together and agreed upon a settlement as follows:

“The plaintiff (meaning the plaintiff in the instant case, who was defendant in the foreclosure suit) was to pay the costs of the foreclosure suit and the interest due within thirty days, and was to execute and deliver to the defendant (who was the plaintiff in the foreclosure suit) a quitclaim deed releasing all his interest in and to the mortgaged premises to him; the defendant was to withdraw the suit, lease the premises to the plaintiff for a sum equal to the interest of the debt, and was to re-convey the premises to him at any time within six months from the 18th day of March, provided the plaintiff should pay to the defendant the debt, \$1700., with interest.”

The court found the settlement as above stated, but with the exception that the six months were to run from the 9th of March, instead of the 18th; and consequently that a tender of payment made on September 12th was not within the six months, time being of the essence. The original mortgagor filed his bill to be permitted to redeem. The court said:

“The plaintiff claims that his prayer to be permitted to redeem should be granted, on the ground that the transaction between the parties is to be regarded in equity as a new mortgage. In support of this claim, he relies upon the familiar principle, that an absolute deed with an agreement to reconvey on the payment of a sum of money, will be treated as a mortgage. The principle itself is not controverted, but its application to this case is denied.

“This, as all other contracts, must be interpreted as understood and intended by the parties. The intention of the parties when discovered must be the law of the case.

“Did the parties intend to continue in another form the relation of mortgagor and mortgagee? Such an intention is not found in terms, and we think the finding is not equivalent to it. The agreement postponed the payment of \$1000. for six months, and provided that the note for \$700. should be paid six months before it was due. In respect to time, therefore, Munson gained nothing but rather lost, while in other respects the risk seems to have been all on his side. At the end of six months, if the debt was not paid, he must again sue for a foreclosure or wait for the plaintiff to bring a suit to redeem. In either case, it was practically giving the plaintiff much more time than he contracted for. That is very nearly a contradiction of the plain terms of the agreement. This is a good test. Suppose the plaintiff had proposed to give a mortgage in form to secure a note payable in six months. Can we presume that Munson would have accepted it? If not, we certainly cannot presume that he intended by this agreement a mortgage simply.

“The whole tenor and scope of the agreement precludes the theory that another mortgage was intended. . The object of the suit brought by Munson was to put an end to that relation. The object of the settlement, so far as the object can be gathered from its terms and the attending circumstances, was to effect a foreclosure by the action of the parties instead of the Court. The very purpose of the deed was to destroy and not to create an equity of redemption; and of the agreement to re-convey, to give to the plaintiff, in lieu of an equity of redemption, a right to purchase for a given price within a limited time. A decree of foreclosure, at the expiration of the time limited, if the debt was not paid, would have foreclosed the equity of redemption. The expiration of the time agreed upon by the parties, the money not being paid, put an end to the right to re-purchase. The result is the same, accomplished by either method. The parties resorted to an agreement doubtless for the purpose of saving expense. In it we see nothing oppressive, and nothing that contravenes any principle of law or equity. The intention of the parties seems to be plain on the face of the transaction, and as we entertain no doubt in

respect to it, we have no occasion to resort to artificial or technical rules of construction for the purpose of construing the agreement."

And in *Adams v. Adams*, 51 Conn. 546, the court said:

"As between the grantor and grantee, a court of equity will treat a deed, absolute on its face, as a mortgage, where it appears, expressly or by implication, that such was the intention of the parties. The reason for this is, that the court will give effect to the real contract between the parties, where the contract is legal and is not contrary to the policy of the law. But when the transaction on its face does not purport to be a mortgage, and it expressly appears that the parties intended that it should not be a mortgage, the court cannot treat it as such any more than it can make a contract for the parties.

"Mrs. Adams held a mortgage on the land in question; the plaintiff applied for a further loan, offering as security an additional mortgage upon the same property. This she declined, but proposed to purchase the plaintiff's interest in the property. The plaintiff assented to that proposition, and thereupon executed and delivered a deed of the property, and Mrs. Adams surrendered the note secured by an existing mortgage. The plaintiff, however, was told that he could have his land again upon paying the note and the money paid, at any time within six months. The court below correctly regarded this transaction, just as the parties did, not as a mortgage to secure a loan, but as a sale, with an option in the plaintiff to re-purchase at any time within six months."

The *Holden* case makes a reference to *White & Tudor's Leading Cases in Equity*, misleading because partial and incomplete. It quotes a sentence and then stops. This is the sentence:

"The maxim, once a mortgage always a mortgage, does not cease to be applicable on the execution of the instrument, and will, on the contrary, invalidate a subsequent

agreement tending to preclude the exercise of the right of redemption."

White & Tudor's L. C. in Eq., Vol. II, Pt. II, p. 984.

In speaking, in this sentence of "a subsequent agreement", the learned annotators are pointing, not to the proposition that an equity of redemption may not be validly contracted away by a subsequent agreement, but to the point that such agreement must be a fair one. This appears from their next sentence, which we quote:

"The burden is, therefore, on the mortgagee to show that a sale or release of the mortgagor's equity was made deliberately and for an adequate consideration."

And again, at the next page, they say:

"There is, however, no rule or policy that precludes the mortgagee from entering into an agreement with the mortgagor for the purchase of the land, or even from taking it in satisfaction of the debt, and a court of equity will not, therefore, set aside a release of the equity of redemption, where it appears to have been freely made and for an adequate consideration" (citing cases from Alabama, Massachusetts, Maryland, New York, Illinois).

The Holden case also cites *Batty v. Snook*, 5 Mich. 231, quoting this language:

"The mortgagor may release the equity of redemption to the mortgagee for a good and valuable consideration, when done voluntarily, and there is no fraud and no undue influence brought to bear upon him for that purpose by the creditor."

The next sentence of the Michigan opinion is then quoted as follows:

“But it cannot be done by a contemporaneous or *subsequent* executory contract, by which the equity of redemption is to be forfeited if the mortgage debt is not paid on the day stated in such contract, without an abandonment by the court of those equitable principles it has ever acted on in relieving against penalties and forfeitures.”

We have italicized the word “subsequent”, in the above excerpt. No explanation is made, in the Holden case for the use of that word by the Michigan court. The Holden opinion makes the excerpt, and that is all. We think an explanation, drawn from its own opinion, is due the Michigan court, and we proceed to make it.

The fact is, that in the Michigan case a partial settlement of some old indebtedness, secured and unsecured, had been made, leaving a balance due and outstanding of \$2000.

Thereupon, the man who still owed the \$2000., deeded back to the creditor, some land which the creditor had previously sold him, and a lien upon which had been cancelled in the settlement. The subsequent contract spoken of in the opinion was, literally, subsequent to this deed to the creditor, but it was only one day subsequent, and the court treated the two instruments, deed and contract, as practically, one instrument, and held that the deed was intended as a mortgage to secure the balance of \$2000., and that the equity of redemption could not be cut off by a contemporaneous paper.

“To allow,” said the Michigan Court,

“the equity of redemption to be cut off by a forfeiture of it in a separate contract, would be a revival of the common law doctrine, using for that purpose two instruments, instead of one, to effect the object.”

Finally, as a last word for the Holden case, it appears that the Kansas court, regardless of the legal effect of the writings, determined that the bank was precluded, by an equitable estoppel, to deny Holden the privilege of redemption. We point, now, to the language of the opinion:

“We agree with the referee and the trial court that, *whatever may have been the legal effect of the writings entered into by the parties, their subsequent conduct was such as to preclude the defendants from denying to the plaintiffs a right to redeem the property.* It was worth at the time of the contract \$60,000. above the liens against it. Holden continued to negotiate sales of parts of it, incurring considerable trouble and expense. Commissions were paid by the bank to him, but he turned them over to the agents who had made the sales. With the consent of the bank, he retained in two instances a part of the proceeds. In order to carry through one sale, he included an unincumbered tract of his own. The bank kept what it called the ‘Holden Collateral Account’, in which record was made of the amounts received and disbursed in connection with the property referred to. This, however, was a matter of convenience and in accordance with its usual plan of carrying real estate assets. At the request of the federal banking officials, a deed was made by the Trading Company to the bank in the early spring of 1905. Holden expended considerable sums in permanent improvements on the property. No accounting was had or asked by the bank concerning these expenditures or the rent account for three years. As the sales of part of the Kansas lands were made, the bank executed partial releases of the mortgage given by the Holden Company to Holden, and by him transferred to the bank; the releases reciting that the mortgage was still in force. We think that, *upon any theory of the effect of the contracts*, the bank must be deemed to have permitted Holden to act upon the assumption that he was to have the benefit of his exertions, and was to own the property whenever the bank had received the amount of its claims, with interest and expenses. Having allowed

Holden to act upon this conception of his rights, the bank cannot deny him the privilege of redemption."

It is said by appellant that the doctrine of the Holden case, whatever doctrine may be meant, is re-affirmed in *Marshall v. Russell*, decided by the Supreme Court of Colorado, 158 Pac. 141, 142. The Colorado case simply affirms the fundamental rule that an equity of redemption may be parted with by the execution of a subsequent agreement, based upon valuable considerations. In that case, a deed had been given by Hurlbert to Smith, as a mortgage to secure an indebtedness. Speak of this deed the court said:

"The deed when executed, being simply a mortgage for the security of a debt, could not thereafter become anything else, except through the execution of a *subsequent* agreement based upon a valuable consideration. Such was not done, for which reason the cases cited by the plaintiff in error are not applicable; but, to the contrary, not only were these instruments, when executed, given as security for this debt, but they were thus treated by the parties to them, not only at the time of their execution and delivery, but thereafter."

In conclusion upon this point, we beg to repeat what Judge Bean said of the settlement of June 8, 1899:

"Its whole scope and tenor preclude the theory that another mortgage or pledge was intended. The object of the suit then pending in the California court was to put an end to that relation by foreclosure and sale of the pledged property. The agreement of settlement was designed to effect that purpose by the action of the parties without the aid of the court. It was intended to dissolve the relation of debtor and creditor, and not to create or continue an equity of redemption in the plaintiff. For that purpose and to that end the parties were to, and did transfer to the bank as trustee all their

interest in the property now in controversy. The bank therefore became in a sense the agent and representative of both parties (*cf. Bury v. Young*, 98 Cal. 451—interjection ours) to hold the property and deliver it to the plaintiff if he complied with the terms of the agreement and made the payment within the time specified, and if not to deliver it to Spreckels & Bros. Company. The plaintiff was given an option to so acquire the property by the payment of a stipulated sum within a definite time. There was no obligation, however, upon his part to make such payment, nor could he have been compelled to do so. It was a mere right or privilege which he could exercise according to his own judgment. Time was made the essence of the contract, and it was expressly stipulated that in the case of the failure of the plaintiff to make the payment within the time specified, the title to the property 'shall vest in and the same shall become the absolute property' of Spreckels & Bros. Company."

III.

ASSUMING FOR ARGUMENT'S SAKE—AGAINST THE FACTS AND THE LAW—THAT GRAHAM HAD A RIGHT OF REDEMPTION, EQUITY WILL NOT PERMIT A REDEMPTION WHERE IT WOULD BE INEQUITABLE TO DO SO.

Over and above the advances for the railroad, represented by the note in the foreclosure case, the Spreckels Company, on going into possession under the settlement, in December, 1899, and finding the road in a condition almost ruinous (p. 566), expended thereafter, and prior to 1907, when Graham filed his first complaint in this case, a sum for rehabilitation and upkeep and betterment, approximating \$200,000.—bringing the advances to the amount of \$728,947. (p. 595). Graham stood by for years, and permitted this expendi-

ture to go on, without taking a step in assertion of adversary right—taking no step until he filed the complaint of 1907. In January, 1900, in the suit which the Spreckels Company was forced to bring, in order to have its stock registered, and to get an accounting from Graham, it was expressly notified to him, as a party defendant, that the Spreckels Company claimed the ownership of the railroad stock and bonds. In the suit by the Farmers' Loan and Trust Company to foreclose on those bonds, he was again notified—he was an intervenor in the case—of the Spreckels Company's claim of ownership to the stock and bonds. On the 8th of February, 1905, he stipulated for judgment against him in those cases; and on the same day he wrote to A. B. Spreckels the letter which we have quoted, and in which he declares that the only unadjusted matter then was, the matter of the life insurance policy, and even as to that, it was for the Spreckels Company, in justice to itself, to say upon what terms it should be dealt with. Upon the record in this case, if any right of redemption can be fetched from far, we have all the elements of estoppel, waiver and abandonment. A court of equity, in these circumstances, would not tolerate a redemption.

Marshall v. Williams, 21 Or., pp. 271-2;

West v. Reed, 55 Ill., pp. 245-6;

Chapman v. Bank of Cal., 97 Cal. 155;

Creamery Co. v. Sharples, 71 S. W. 1068;

Hall v. Eccles, 65 N. W. 1052;

Chouteau v. Iron Works, 7 S. W. 467;

McKenna v. McKenna, 118 Ill. App. 240.

IV.

THE QUESTION OF LACHES.

Graham did not file his original complaint until December, 1907. It was at law, in conversion. Eight years after, he sets up a new cause of action, what is called in his brief, a bill to redeem. This was to set up a new cause of action against which laches are to be computed as of the time of the filing of the amended complaint in January, 1916 (*Whalen v. Gordon*, 95 Fed. 305; *Galesburg v. Hart*, 221 Fed. 7). In the case at bar we find the slothful commencement of an inequitable case, its slothful prosecution, and, meantime, one important witness after another entered upon the roll call of death. Such laches do not invite the interposition of a court of equity.

Chapman v. Bank of Cal., 97 Cal. 155;

Drees v. Waldron, 212 Fed. 93;

Weniger v. Mining Co., 227 Fed. 548.

V.

THE STATUTE OF LIMITATIONS.

1. On the assumption that the Spreckels Company was still in relation to Graham as a pledgee, there was an unequivocal repudiation of the same, at least as early as January, 1900, when the Spreckels Company brought suit against the Coos Bay Railroad Company and Graham, alleging in the complaint that it was the absolute owner of the stock and bonds in question.

Jones on Collateral Securities, 3d Ed., sec. 583;

Gilmer v. Morris, 43 Fed. 456;

University v. National Bank, 3 S. E. 359;

Chapin v. Freeland, 142 Mass. 383;

Shelby v. Guy, 24 U. S. 361;

Campbell v. Holt, 115 U. S. 625.

2. Since the cause of action, in this view, arose in California, and plaintiff and defendant were non-residents of Oregon, the action to redeem was barred in three years from January, 1900, under Subdivision 3 of Section 338, of the California Code of Civil Procedure (see Lord's Oregon Laws, Section 26, providing that the California Statute of Limitations governs under the circumstances). Graham alleges in his complaint that he was both a citizen and resident of Great Britain. And it appears without contradiction that he has not been a resident of Oregon since December 18th, 1899 (p. 565).

3. If the Spreckels Company is to be charged with having appropriated to itself in December, 1899, the properties in question, without Graham's consent, and unlawfully, and with holding them as a constructive trustee (*Chapman v. Bank of California*, 97 Cal. 155), the statute of limitations would begin to run as of that time (*Norton v. Bassett*, 154 Cal. 411); and the cause of action became barred, in four years thereafter, under Section 343 of the Code of Civil Procedure of California (*Hecht v. Slaney*, 72 Cal. 366).

CONCLUSION.

An apology is due the court for the length to which this brief has been drawn out. We may be indulged,

however, in the hope that the labors of the court will be made less heavy by the full and ample references, which we have sought to make, to the record in the case, and to the authorities cited. It has been difficult to deal with the case in brief compass. The transactions went much into detail, there was much documentary evidence, and the claim made is belated, audacious, and exasperating. The amount of the railroad advances with interest, is \$1,088,178.04. This is increased to \$1,288,178.04 by expenditures made upon this railroad after the Spreckels Company took possession under the settlement. Of the \$1,300,000. which the Southern Pacific Company paid, and of which, commissions allowed for, the Spreckels Company received approximately a million dollars, part only is attributable to the properties in question here, namely, \$650,000.—leaving a balance on railroad account of over half a million dollars. The net result to the Spreckels Company of its dealings with Graham, is thus expressed by Mr. Samuels:

“We had actually invested at the time of the sale to the Southern Pacific Railroad Company. \$1,947,350.20. We got \$1,000,000. We bid the nine hundred and fifty-nine thousand dollars good-bye” (pp. 595-6).

It is now respectfully submitted that the judgment and decree of the District Court should be affirmed.

Dated, San Francisco,
February 14, 1917.

MORRISON, DUNNE & BROBECK,
FENTON, DEY, HAMPSON & FENTON,
Attorneys for Appellees.

APPENDIX.

This agreement, made this 8th day of June, 1899, by and between R. A. Graham, party of the first part, and J. D. Spreckels & Bros. Company, a corporation, party of the second part,

WITNESSETH

That the parties hereto, for the purpose of completely adjusting all matters of difference between themselves, and between each of them and the Beaver Hill Coal Company, a corporation, and the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, a corporation, do hereby agree as follows:

1. That the receivership suit brought by the first party against said Beaver Hill Coal Company, and now pending in the Circuit Court of the United States for the District of Oregon, shall at once be dismissed upon the settlement of the account of W. W. Catlin, receiver of said Company, each party to said suit to bear his own costs; that an order be at once made in said suit directing said receiver to render an account to said court, and that upon the settlement of said account an order be made removing said receiver; that all proper fees, costs and charges of said receiver and of J. B. Hassett, the former receiver, and all proper certificates issued by said Hassett and said Catlin as said receivers, be paid as far as possible out of the funds in the hands of said Catlin, as said receiver when the same are allowed by the said court; that said receiver shall surrender the possession and custody of

all the property of said Beaver Hill Coal Company unto said company; that said company shall remain in the possession of all its said property during the life of this agreement, without interference in any manner by the first party; that the second party will cause proper steps to be taken by the Beaver Hill Coal Company, so long as it controls the same, for the care and preservation of said property during the life of this agreement; and that the moneys received by said company after the removal of said receiver shall be applied towards the payment of the balance, if any, remaining due for said fees, costs and charges of said Hassett and Catlin, as said receivers, and on said certificates of said receivers, and also towards the payment of all proper expenses incurred in the care and preservation of the property of said company after the removal of said Catlin, as said receiver, and during the life of this agreement.

2. That the suit brought by said Beaver Hill Coal Company against the first party for an accounting, now pending in the Superior Court of the City and County of San Francisco, State of California, shall be at once dismissed, each party thereto to bear his own costs, and that there shall be delivered to the first party, upon the signing of this agreement, a release executed by said Beaver Hill Coal Company, releasing and discharging the first party of and from any and all claims and demands which it may now have or claim to have against him.

3. That the receivership suit brought by the second party against the Coos Bay, Roseburg & Eastern Rail-

road & Navigation Company now pending in said Circuit Court of the United States, for the District of Oregon, shall be at once dismissed, each party thereto to bear his own costs.

4. That a judgment shall be at once entered in the suit brought by the second party against the first party, now pending in said Superior Court of the City and County of San Francisco, State of California, (Department No. 3 thereof), numbered 64,541, in favor of the second party and against the first party for the sum of \$523,162.52 together with interest thereon at the rate of six per cent per annum from the 1st day of April, 1898, both in United States gold coin and providing for a sale of the pledged securities sought to be foreclosed in said suit, and with the usual provisions for the docketing of a judgment against the first party for any deficiency which may exist after the sale of the collaterals specified in the original complaint in said suit; that all proceedings to enforce said judgment be stayed for the period of six months after the date of this agreement.

5. That the parties hereto hereby designate and appoint the Bank of California a corporation, as trustee for them, to hold the properties and written instruments hereinafter mentioned for the purposes hereinafter set forth, and to perform the duties hereinafter prescribed.

6. That the first party shall deliver to said trustee:

a. All of the shares of the capital stock of said Coos Bay, Roseburg & Eastern Railroad and Navigation Company in excess of the 10,001 shares thereof now held by the second party, certificates therefor to be properly

endorsed, excepting seven shares thereof to be issued to the directors of said Company as hereinafter provided.

b. The resignations of all of the directors of said Company now in office, the same to take effect upon the election of the directors hereinafter named.

c. A release executed by the first party releasing and discharging the said Beaver Hill Coal Company of and from any and all claims and demands which he may now have or claim to have against said company, said release not to take effect, however, except upon the failure of the first party to pay or cause to be paid to said trustee, for the use and benefit of the second party, the sum of \$550,000.00 gold coin of the United States, as hereinafter provided.

d. A release executed by the first party releasing and discharging the said Coos Bay, Roseburg & Eastern Railroad & Navigation Company of and from any and all claims and demands which he may now have or claim to have against said Company; also a disclaimer of all right, title or interest in or to any of the property of said Company including the equipments and rolling stock of the railroad, and the spur tracks to the mine of the Beaver Hill Coal Company, and to the mine of the Beaver Coal Company, the same being known as the "Klondike Mine", said release and disclaimer not to take effect, however, except upon the failure of the first party to pay or cause to be paid to said trustee, for the use and benefit of the second party, said sum of \$550,000.00 gold coin of the United States, as hereinafter provided.

That the second party shall deliver to said trustee:

a. The certificate for the 10,001 shares of the capital stock of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company heretofore pledged to the second party by the first party, said certificate to be properly endorsed by the second party.

b. All of the bonds of the said Coos Bay, Roseburg & Eastern Railroad & Navigation Company heretofore pledged by the first party to the second party, and now in its hands, of the par value of \$620,000.00.

c. Assignments, in proper form, to said trustee, of all judgments of record which have been rendered in the courts of Coos County, in the State of Oregon, in favor of the second party, and are now held by it as collateral security for the payment of moneys owing to it by the first party.

d. All of the shares of the capital stock of said Beaver Hill Coal Company, excepting one share thereof to be issued to each one of the present directors of said Company, but said shares of stock issued to said directors shall be duly endorsed and delivered by them to said trustee as soon as possible hereafter, the same to be then held by said trustee together with the other shares of said stock for the uses and purposes hereinafter set forth.

e. A satisfaction, in proper form, and duly acknowledged of said judgment entered in said suit mentioned in paragraph number four of this agreement.

That the first and second parties shall jointly execute and deliver to said trustee a deed to the following-

described property situate in the Town of Marshfield, in Coos County, Oregon, sufficient in form and substance to vest the title thereto in said trustee, to wit:

All of blocks numbered one (1), two (2), six (6), eight (8), sixteen (16), twenty-one (21), twenty-eight (28), thirty-three (33), thirty-four (34), thirty-five (35), thirty-six (36), thirty-seven (37), forty-six (46), forty-seven (47), forty-eight (48), forty-nine (49), fifty-two (52), fifty-three (53), fifty-four (54), fifty-seven (57), fifty-nine (59), sixty-three (63), sixty-six (66), sixty-seven (67), seventy (70), seventy-one (71), seventy-five (75), seventy-seven (77), eighty (80), eighty-one (81), eighty-four (84), eighty-five (85), also block lettered "C", also lots one (1) and two (2) and lots eight (8) to forty (40) inclusive, in block numbered fifty-six (56), in "Railroad Addition to Marshfield", according to the plat of said Addition made by G. H. Spencer, and duly recorded in the office of the County Recorder of said Coos County, Oregon.

7. That there shall be transferred and issued to each of the following named persons, to wit: William L. Pierce, Frederick S. Samuels, W. S. Chandler, S. H. Hazard, R. A. Graham, J. W. Bennett and T. R. Sheridan, one share of the capital stock of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, which said shares of stock shall be duly endorsed and delivered by them to said trustee as soon as possible hereafter, the same to be then held by said trustee together with the other shares of said stock for the uses and purposes hereinafter set forth. That a meeting of the directors of said

Company shall be called for the reorganization of the Board of Directors of said Company, and at said meeting the persons above named shall be elected to serve as directors of said Company during the life of this agreement, and until their successors are elected and qualified. Upon their election, as such directors, there shall be signed by each of said parties a written resignation of his said office as director, the same to be then delivered to said trustee; such resignations not to take effect, however, except as hereinafter provided.

8. The first party shall remain as manager of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company during the life of this agreement, and subject to the terms hereof. At all times during the life of this agreement the second party shall be entitled to have a representative in the County of Coos, State of Oregon, who shall be permitted at all times, upon demand, to inspect all books, papers and vouchers of every kind connected with the business of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company. Said Company shall be operated during the life of this agreement as a railroad corporation and common carrier of passengers and freight for hire, and shall not be used to further the personal purposes or enterprises of any individual in any manner which will not be to the best interests of said Company, and shall offer no special advantages in freights or fares, rebates or credits to any individual not granted to the community by general tariff and regulation. It is agreed that the rate of forty cents per ton hereto-

fore fixed for the transportation of the coal of the Beaver Coal Company over said railroad shall not be changed during the life of this agreement.

9. That if, at any time within six months from the date of this agreement, the first party shall pay or cause to be paid to the said trustee, for the use and benefit of the second party, the sum of \$550,000.00 in gold coin of the United States, the title to all of the shares of stock, bonds, real property and judgments below mentioned shall thereupon vest in, and the same shall become the absolute property of the first party; and said trustee is hereby authorized and directed to thereupon deliver to the first party, and the second party hereby obligates itself to cause to be thereupon delivered to him——

a. All of the capital stock of said Beaver Hill Coal Company placed in the hands of said trustee, and all of the shares thereof issued to said directors of said Company, all duly endorsed.

b. All of the capital stock of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, placed in the hands of said trustee, and all of the bonds of said Company placed in the hands of said trustee.

c. A good and sufficient deed of conveyance executed by said trustee to the first party, of the above described real property in said town of Marshfield.

d. Assignments, in proper form, executed by said trustee to the first party, of all said judgments in favor of the second party assigned by it to said trustee, as hereinabove provided, or, if said judg-

ments, or any of them, have been collected by said trustee, then to pay over the moneys collected thereon to the first party.

e. Said satisfaction of said judgment entered in said suit mentioned in paragraph number four of this agreement.

f. The resignations of the following directors of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, to wit: William L. Pierce, Frederick S. Samuels, W. S. Chandler and S. H. Hazard, said resignations to then take effect.

g. Said release executed by the first party in favor of said Beaver Hill Coal Company, and said release and disclaimer of the first party in favor of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company.

And said trustee shall at the same time deliver to the second party said sum of \$550,000.00, in gold coin of the United States.

Said payment of said sum of \$550,000. in gold coin of the United States to said trustee, for the use and benefit of the second party, shall operate as a full settlement, satisfaction and discharge of all claims and demands of every kind and nature whatsoever now existing in favor of either party hereto against the other; and of all claims and demands of every kind and nature whatsoever now existing in favor of the second party against said Beaver Hill Coal Company and said Coos Bay, Roseburg & Eastern Railroad & Navigation Company.

The second party further agrees that it will, upon demand of the first party at any time after the payment of said sum of \$550,000. to said trustee, execute a proper consent in writing to the cancellation of that certain order heretofore given by said Coos Bay, Roseburg & Eastern Railroad & Navigation Company to the Farmers Loan & Trust Company, directing the delivery by said Farmers Loan & Trust Company to the second party of the bonds of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, as they may be issued from time to time.

10. Should the first party fail to pay or cause to be paid to the said trustee for the use and benefit of the second party, within said six months from the date hereof, said sum of \$550,000.00, in gold coin of the United States, the title to all of the shares of stock, bonds, real property and judgments above mentioned shall, at the expiration of said six months, vest in and the same shall become the absolute property of the second party; and said trustee is hereby authorized and directed to thereupon deliver to the second party——

a. All of the capital stock of said Beaver Hill Coal Company placed in the hands of said trustee, duly endorsed.

b. All of the capital stock of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company placed in the hands of said trustee, and all of the bonds of said Company placed in the hands of said trustee.

c. A good and sufficient deed of conveyance executed by said trustee to the second party of the above described real property in said town of Marshfield.

d. Assignments, in proper form, executed by said trustee, to the second party of all said judgments in favor of the second party assigned by it to said trustee, as hereinabove provided, or, if said judgments, or any of them, have been collected by said trustee, then to pay over the moneys collected thereon to the second party.

e. The resignations of the following directors of the said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, to wit: R. A. Graham, T. R. Sheridan and J. W. Bennett, said resignations to then take effect:

f. Said release executed by the first party in favor of said Beaver Hill Coal Company, and said release and disclaimer of the first party in favor of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company.

And said trustee shall at the same time deliver to the first party said satisfaction of said judgment entered in said suit mentioned in paragraph number four of this agreement; and the second party shall cause said Coos Bay, Roseburg & Eastern Railroad & Navigation Company to execute and deliver to the first party a release and discharge of any and all claims and demands which it may have or claim to have against the first party. And all matters and things in dispute between the parties hereto, or between the first party and said Beaver Hill Coal Company and said Coos

Bay, Roseburg & Eastern Railroad & Navigation Company, and all claims and demands shall be and become, by virtue hereof, finally and forever settled and determined.

11. Upon the performance by said trustee of the acts hereinabove provided to be done by it, said trust shall cease and determine.

12. The second party further agrees to cause to be executed and delivered by said Beaver Hill Coal Company to said T. R. Sheridan, of Roseburg, Oregon, upon the execution of this agreement, a quit-claim deed to the northeast quarter of section nineteen, township twenty-seven south of range thirteen west of the Willamette Meridian; also to cause to be executed and delivered by A. B. Spreckels, (the vice-president of the second party), to the trustee hereunder, upon the execution hereof, an agreement whereby the first party shall be given the option and right to purchase from said A. B. Spreckels all his right, title and interest in and to that certain real property in said Coos County, Oregon, known as and called the "Chadwick Tract", upon the payment by the first party to said A. B. Spreckels of the sum of money paid by said A. B. Spreckels for said right, title and interest in and to said property, together with interest thereon at the rate of six per cent per annum, said agreement for said option not to take effect, however, except in the event that the first party shall pay said sum of \$550,000.00 to said trustee for the use and benefit of the second party within said six months from the date hereof, as hereinabove provided.

13. The second party further agrees that it will re-deliver to the first party that certain policy of life insurance issued to the first party by the New York Life Insurance Company, numbered 664,673, and now held by the second party together with a waiver by it of all claim to or interest in said policy, upon the payment to it by the first party of the sum of \$2950.00, at any time during the life of this agreement.

14. It is mutually agreed that time shall be of the essence of this agreement and that this agreement shall inure to the benefit of and shall bind the heirs, executors, administrators, successors or assigns of the respective parties hereto.

In witness whereof, the first party has hereunto set his hand and the second party has caused its corporate name and seal to be hereunto affixed by its President and Secretary, the day and year first above written.

Done in duplicate.

R. A. GRAHAM.

J. D. SPECKELS & BROS. COMPANY.

By John D. Spreckels,

Its President

Chas. A. Hug,

Its Secretary.

(Seal)

Witnesses to signature of R. A. Graham:

ISAAC FROHMAN.

E. F. PRESTON.

We hereby accept the foregoing trust.

THE BANK OF CALIFORNIA.

S. P. Smith,

By Clay. 51

